Petition

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No.

In the Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

v.

LANCE GATES AND SUSAN GATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?

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Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on June 26, 1981, and it may be found at 85 Ill.2d 376, ____ N.E.2d ____, ____ Ill.Dec. ____ (1981). The court in its opinion held that the anonymous letter received by police did not satisfy the two-prong test for probable cause enunciated in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509. The court found that the "basis of knowledge" prong was not satisfied since the anonymous letter did not

contain any statement showing that the information was acquired through personal or firsthand knowledge. The court also found that the letter did not describe the accused's criminal activity in sufficient detail so as to allow an inference of personal knowledge of the informant.

In addition, the court found that there was no showing that the informant was credible, as required by the "veracity" prong of the *Aguilar* test, since the identity of the informant was not known and the informant failed to admit activities which were against his penal interest.

The court declined to address the question of whether the corroboration of the tip by the FBI agent cured the defect in either prong of the *Aguilar* test, stating that the corroborating "evidence" was only of innocent rather than criminal activity. The court found that such corroboration is insufficient to support a finding of probable cause. The Appellate Court — Second District, by order, had previously affirmed the trial court's order quashing the search warrant and suppressing the evidence. A copy of the Appellate Court's order, as well as a copy of the opinion of the Illinois Supreme Court is appended to this petition.

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court affirming the order of the Appellate Court was rendered on June 26, 1981. This petition is filed within sixty days of that opinion. The jurisdiction of the Supreme Court of the United States to hear this case is invoked under 28 U.S.C. 1257(3), since in the proceedings in the state courts of Illinois the Respondents have specifically set up, and throughout asserted, an alleged violation of their rights arising under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution amendment IV.;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On May 3, 1978, the Bloomingdale police department received by mail an anonymous handwritten letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.

I guarantee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Sue Gates
Greenway
in Condominiums."

The chief of police delivered the letter to Charles Mader, a detective of the Bloomingdale police department and he requested one of the department's radio operators to seek assistance from the Secretary of State's office in Springfield in obtaining a specific address for the Gates. That office advised than an Illinois driver's license had been issued to a Lance Gates residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had provided reliable information to Mader during the previous two years. Upon examining certain financial records to which the informant had access, he reported a new address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the Secretary of State's office.

Upon inquiry, Mader was told by an officer of the Chicago police department assigned to O'Hare Airport that "L. Gates" had made a reservation with Eastern Airlines on its flight 245, which was to depart from O'Hare on May 5, at 4:15 p.m. The final destination of the flight was West Palm Beach, Florida.

On May 5, Mader was told by William Morely, an agent of the Drug Enforcement Administration, that "Lance Gates" had boarded Eastern Airlines flight 245 bound for Florida. The following day Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told him that he observed Gates and an unidentified woman leave the room at 7 a.m. and enter a red vinyl over gray Mercury with 1978 Illinois license

number RS 8437. Records at the Secretary of State's office showed that the license plate was registered for Lance B. Gates, but had been issued for a different automobile.

Based on the anonymous letter, the described information obtained from the law enforcement authorities, and the verification of the address obtained from the confidential informant, Mader, on May 6, sought and obtained in the circuit court of DuPage County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving in Florida.

At 5:15 a.m. on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by waiting Bloomingdale police officers. In the trunk of the Mercury the officers found several large bundles of marijuana weighing a total of approximately 350 pounds. A search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. Police also ascertained that the couple had cocaine in their possession. They were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm.

The defendants filed a pretrial motion to quash the search warrant and to suppress all physical evidence obtained as a result of the search, arguing that the anonymous letter did not set forth the underlying circumstances or manner in which the informant acquired the information or that the information was reliable as required under the test for probable cause described in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509. The defendants also argued that the separate evidence obtained by Detective Mader in his independent investigations did not corroborate the anonymous informant's accusations that the Gateses were involved in

criminal activity so as to support the issuance of a search warrant based on probable cause. The motions to quash and to suppress evidence were allowed by the circuit court of DuPage County, and its action was affirmed by the appellate court (82 Ill.App.3d 749).

The People then appealed to the Illinois Supreme Court which affirmed the Appellate Court on June 26, 1981. No petition for rehearing was submitted.

REASONS FOR GRANTING THE WRIT

DETAILED INFORMATION PROVIDED TO POLICE BY AN ANONYMOUS INFORMER, COUPLED WITH GOVERNMENT CORROBORATION OF THE INFORMATION, ESTABLISHED PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT IN THIS CASE. THE ENFORCEMENT OF DRUG LAWS IN ILLINOIS WILL BE THWARTED IF OFFICERS ARE NOT PERMITTED TO RELY UPON DETAILED INFORMATION PROVIDED THEM BY AN ANONYMOUS CIVILIAN INFORMER.

Illinois police officers attempting to stop illegal drug activity are in large part dependent upon civilian informers, frequently anonymous informers, to provide information for their investigations. By its ruling below, the Illinois Supreme Court has drastically narrowed this avenue of information for investigation. Due to misinterpretation of the case law pronounced by this Court, the Illinois Supreme Court has severely restricted the use of anonymous informers' revelations to obtain search warrants for the enforcement of drug laws.

The standard for probable cause in assessing a complaint for a search warrant is a probability of the existence of criminal activity and not a *prima facie* showing, of actual criminal activity. *Beck v. Ohio*, 379 U.S. 89, 96, 13 L.Ed.2d 142, 147, 85 S.Ct. 223 (1964). Affidavits relating to probable cause are to be tested by a considerably less rigorous standards than those governing the admissibility of evidence at trial. *McCray v. Illinois*, 386 U.S. 300, 311, 18 L.Ed.2d 62, 70, 87 S.Ct. 1056 (1967). In analyzing probable cause, issuing magistrates are neither to be confined by insubstantial limitations nor by restrictions on the use of their common sense. *United States v. Ventresca*, 380 U.S. 102 at 108, 13 L.Ed.2d 684 at 688, 85 S.Ct. 741 (1965). In cases of this type determination of probable cause by issuing magistrates shall be paid great deference by courts of review. *Jones v. United States*, 362 U.S. 257, at 270-271, 4 L.Ed.2d 697 at 707-709, 80 S.Ct. 725, 78 ALR 2d 233 (1960).

The recognized test applied to complaints for search warrants based on hearsay information is the "two-pronged" test as set out in *Aguilar v. Texas*, 378 U.S. 108 at 114, 12 L.Ed.2d 723 at 729, 84 S.Ct. 1509 at 1514 (1964). The Court there in pertinent part held:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, 78 ALR 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825, was "credible". . . . [*Aguilar v. Texas, supra*, 378 U.S. at 114.]

Thus, the first prong of the test requires that the magistrate be informed of "some" of the underlying circumstances from which the informant concluded that narcotics were where he claimed them to be. This prong is used to determine whether the informant obtained his information in a reliable manner. The second prong of the *Aguilar* test requires that the officer set forth information from which he concluded that the hearsay declarant was credible.

A. The Detailed Nature Of The Information Contained In The Anonymous Letter Was Sufficient To Allow The Issuing Judge To Infer That The Informant Had Obtained His Information In A Reliable Manner.

The first prong, or the "basis of knowledge" part of the test announced in *Aguilar* is most often satisfied by the informant's declaration that he is revealing personal knowledge gathered through some physical sensory faculty such as that of sight, smell, or sound. (*See Stanley v. State*, 19 Md.App. 507, 531, 313 A.2d 847, 861 (1974).) Absent an informant's statement regarding the manner in which information was obtained, the magistrate must be convinced that the information is furnished by the source under circumstances demonstrating or inferring the reliability of the information. *Spinelli v. United States*, 393 U.S. 410, 425, 21 L.Ed.2d 637, 89 S.Ct. 329 (1959). As Justice White explained in his concurring opinion in *Spinelli*, when the information is:

> Sufficiently detailed [it] will in effect verify itself — that is, the magistrate when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way. See, Ante, at 417, 11 L.Ed.2d 644. Detailed information may sometimes imply that the informant has himself observed the facts. 393 U.S. at pg. 425.

The *Spinelli* Court discussed the determination which the issuing magistrate must make when an anonymous informant does not demonstrate the exact manner or circumstances in which he or she received the information.

> In the absence of a statement detailing the manner in which the information was gathered it is especially important that the tip describe the accused's criminal activities in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's reputation.
> [393 U.S. at 416, 21 L.Ed.2d at 645, 89 S.Ct. at 590.]

In *Draper v. United States*, , 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959) a paid informant provided an FBI agent with a mere description of the defendant and his mode of transportating certain drugs. The detail with which it was provided however, was one reason it was sufficient for the court to infer that it was obtained in a reliable manner.

Referring to the *Draper* informer's information in the subsequent *Spinelli* decision, Justice White said, "the kind of information related by the informant is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him." *Spinelli, supra*, 393 U.S. at 426. In the present case, as in *Draper*, the details of the travel arrangements confirm the reliability of the informer's information. The information provided by the informer relating to the involved travel arrangements of these defendants was in great detail and was elevated to a high degree of reliability by the corroboration of government agents' eyewitness observations.

The anonymous letter was received by the police on May 3 and gave the names, relationship and approximate addresses of these defendants; "they live on Greenway, off Bloomingdale road in the condominiums."

The letter stated that the defendants made most of their drug buys in the State of Florida, that Ms. Gates would drive their motor vehicle to Florida and then Mr. Gates would fly down and drive the vehicle back to Illinois. The letter stated that on May 3 (the date it was received) she would be driving down and he would meet her and the car there "in a few days." Additionally, the letter stated not only the value of the narcotics which would be found, but also their precise location in both the Gates' home and automobile. The informant also included a statement that the Gates' "brag about the fact they never have to work." Finally, the letter relates that drug dealers frequent the Gates' home.

An anonymous letter detailing the manner in which drugs were transported, when and how the next transport would occur, where the drugs were stored, and finally some of the personal characteristics of the defendants themselves should certainly be sufficient to convince a magistrate that the information was something other than "casual rumor" or a mere accusation based on the defendants' reputation in the underworld community. As stated by Justice White, the magistrate presented with such intimate detail could "reasonably infer that the informer had gained his information in a reliable way." *Spinelli*, *supra*, 393 U.S. at 425.

In this case, the Illinois Supreme Court held that the information provided here was not "in sufficient detail to lead a magistrate to conclude that the tip was the product of firsthand knowledge or personal observation." [Slip opinion, p. 9]. Further, the court distinguished the present case from *Draper* in that the informant in *Draper* had previously given reliable information to the affiant. [Slip opinion, p. 8]. Further, the court found that the present case was more analogous to *Spinelli* than *Draper*. [Slip opinion, pg. 6]. The court erred in so holding.

The present case directly parallels *Draper* as stated by Justice Moran, joined by Justice Underwood, in his dissenting opinion below:

> "[U]nder the court's analysis in *Spinelli*, the result in *Draper*, in light of *Aguilar*, does not hinge on the mere averment that the informant had previously given reliable information. Rather, the determining factor in establishing probable cause and complying with both prongs of *Aguilar* is the specificity of the tip combined with the police verification by investigation."
> [Slip opinion, pg. 13, 14].

Here, as in *Draper*, the police were provided with a specific, detailed and future sequence of events, as emphasized by Justice Moran. [Slip opinion, pg. 12]. Further, in this case, as in *Draper*, every detail of the informant's letter was corroborated by police investigation, clearly indicating that the informant had an underlying basis of knowledge.

The present case is readily distinguishable from *Spinelli*. In that case the information was provided by a "confidential, reliable informant." The affidavit stated that the informant told law enforcement agents that Spinelli was "accepting wagers and disseminating wagering information by means of telephones which have been assigned numbers WYdown 4-0029 and WYdown 4-1036." 393 U.S. 410, 414, 21L.Ed.2d 637, 642, 89 S.Ct. 584, 588. The Court held the affidavit was insufficient to establish probable cause. The Court in *Spinelli* found there was insufficient detail from which a magistrate could infer that the informant had gained his information in a reliable way. Further, the Court found that the investigative police work in *Spinelli* corroborated only that Spinelli could have used two telephones for gambling or for some other purpose. Clearly, the present case contains much more detail and corroboration than that in *Spinelli*.

For the foregoing reasons, the details provided were sufficient to satisfy the first prong of the *Aguilar* test. The issuing judge correctly inferred from the detailed information provided that the informant obtained his information in a reliable way. The trial court erred in reversing the issuing magistrate's finding of probable cause and the Appellate Court and Supreme Court erred in affirming that action.

B. Corroboration Of Informant's Letter Is Relevant To And May Be Used To Support The First Prong Of The *Aguilar* Test. Sufficient Corroboration Existed Here To Warrant A Finding Of Probable Cause.

In this case, the People contended that the judge who issued the search warrant correctly considered the fact that much of the information provided by the informant was corroborated by other law enforcement officials and a reliable informant. The Appellate Court stated that such corroboration could not be used to support the first prong of the *Aguilar* test, the basis of the knowledge prong. The court held "Corroboration does not establish that the informer obtained his information in a reliable manner." The Illinois Supreme Court refused to address this issue in the present case, holding that "The corroboration of innocent activity is insufficient to support a finding of probable cause." Slip opinion, p. 10. The court's holding clearly reflects a misunderstanding and misapplication of the law as previously expressed by this Honorable Court in *Draper v. United States*, 358 U.S. 307 3 L.Ed.2d 327, 79 S.Ct. 329 (1959), *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969).

In *Spinelli*, the Court established the approach to be taken by lower courts where, as here, the informant's tip is a

necessary element in a finding of probable cause. The Court held that:

> "If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration."
> [393 U.S. at 415.]

In *Spinelli*, the FBI was informed by a "confidential, reliable informant," that Spinelli was "operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." 393 U.S. at 414. The FBI conducted an independent investigation of defendant corroborating the two telephone numbers (although listed to another person). In addition, the FBI observed the defendant travel to and from the apartment building, park his car there, and enter one of the apartments. The FBI agents also informed the issuing magistrate that Spinelli was "known to [the] affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers." *Id.* This Court held that probable cause did not exist, and found that the independent investigation was not sufficient "to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." 393 U.S. at 417. The *Spinelli* Court nowhere stated that corroboration could not be used to support the first prong of the *Aguilar* test; it only held that in that particular case neither prong of the test was supported by independent police corroboration.

In *Draper*, decided before *Aguilar*, the tip of a reliable, paid informer was investigated by a police officer and many of the details of the tip were corroborated. It is significant to note that the reliability of the informer was not in issue. Therefore, the police corroboration in that case went to establish only the trustworthiness of the information, which later became a "basis of knowledge" prong of *Aguilar*. In *Draper*, the Court stated:

> And surely, with every other bit of [the informant's] information being thus personally verified, [officer/affiant] had "reasonable grounds" to believe that the remaining unverified bit of [the informant's] information — that Draper would have the heroin with him — was likewise true.
> [*Draper, supra*, 358 U.S. at 313].

The *Spinelli* Court recognized that corroboration could be used to support the basis of knowledge prong:

> Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant .... It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established.
> [393 U.S. at 417, 418].

In *Whitely v. Warden of Wyoming State Penitentiary*, 401 U.S. 560, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971), it was stated:

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officer can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. *Draper v. United States*, 358

> U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959). See *Spinelli v. United States, supra*, at 423, 21 L.Ed.2d at 647. [*Whitely*, 28 L.Ed.2d at p. 312].

It again must be emphasized that corroboration in *Whitely* was not limited by this Court to use in satisfying only the reliability prong of *Aguilar*, as mistakenly held by the Illinois Supreme Court. Other cases holding that corroboration is relevant to whether the informer gathered his information in a reliable way include, *State v. Thorp*, 358 A.2d 655, 659 (N.H. 1976); *United States v. Edmonds*, 535 F.2d 714, 720 (2nd Cir. 1976); *United States v. Anderson*, 500 F.2d 1311, 1316 (5th Cir. 1974); *United States v. Foose*, 402 F.Supp. 526 (D.C. PA. 1975); *United States v. Hall*, 468 F.Supp. 123 (D.C. Texas 1979). The theory rejected by both the Appellate Court and the Illinois Supreme Court is sound. If much of the informer's information is corroborated, the indication is that the informer got his information in a reliable way.

Even though the information in the letter is hearsay, there is a substantial basis for crediting it because the letter's details were fully corroborated by other independent sources; federal agents, a police official, and a reliable informant. "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale. . . ." *Jones v. U.S.*, *supra*, 306 U.S. at 271.

Under the facts in this case the issuing judge correctly found that the anonymous informer's information was reliable, and as such satisfied the requirements of the first prong of the *Aguilar* test. The details of the letter regarding defendants' activities and the detailed corroboration of those facts support a conclusion that the judge correctly found that the information was accurate and truthful. The name and address of the defendant was corroborated by another informant who had given the affiant information in the past leading to seven arrests and seven convictions. The physical

description of Lance Gates was obtained through independent police investigation of Gates' driver's license. A person matching that description boarded the flight bound for Florida, again corroborating the anonymous letter. In Florida, the defendant met a woman in a room at a hotel registered to defendant Sue Gates. Again, the travel arrangements in the letter were independently corroborated. The following day, the two defendants drove back to Illinois (again corroborating the letter) in a motor vehicle with license plates registered to another automobile owned by the defendant. This type of corroboration is as sufficient as that found in *Draper*, where the only corroboration of the tip related to the defendant's travel arrangements and physical description. Furthermore, the independent police work here "corroborated much more than one small detail that had been provided by the informant," *Spinelli*, 393 U.S. at 417, and is therefore readily distinguishable from the *Spinelli* case.

The Illinois Supreme Court refused to consider the corroborating evidence on this case because only "innocent facts" were corroborated. That this holding was in error is clear from a reading of *Draper*, in which only the innocent facts of defendant's physical description and travel arrangements were corroborated. In addition, it must be emphasized here that such short-term travel arrangements, which seemingly have no purpose, are common in drug trafficking cases. This Court in *Spinelli* recognized that certain activity, which is seemingly innocent, may take on a more sinister color by virtue of an informer's tip. Thus, although the conduct of the defendant in *Spinelli* coupled with the informant's tip was not sufficient in itself to suggest criminal activity, the Court noted that had the premises involved contained an unusual number of telephones or if abnormal activity had been observed probable cause may well have been found. 393 U.S. at 418. In the present case, the short-term, seemingly purposeless travel arrangements, were sufficient to establish probable cause, and

the issuing magistrate was entitled to rely on such common sense considerations. *United States v. Ventresca*, 380 U.S. 102, 108, 13 L.Ed.2d 684, 688, 85 S.Ct. 741 (1965).

The People ask this Honorable Court to grant this petition and issue a Writ of Certiorari to review the decision of the Illinois Supreme Court. The misunderstanding and misapplication by Illinois courts of the notion of corroboration as set forth in *Spinelli* and *Draper*, will result in continuing injustice if it is not corrected and clarified by this Court. The People request that this Honorable Court grant the People's Petition for a Writ of Certiorari, and ultimately vacate the judgment of the Illinois Supreme Court and remand this case for further prosecution.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

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Appendix

SUPREME COURT OPINION

Docket No. 53453 -- Agenda 6 -- January 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,
v. LANCE GATES *et al.*, Appellees.

MR. JUSTICE WARD delivered the opinion of the court:

On May 3, 1978, the Bloomingdale police department received by mail an anonymous handwritten letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
>
> Lance & Sue Gates
> Greenway
> in Condominiums."

The chief of police delivered the letter to Charles Mader, a detective of the Bloomingdale police department and he requested one of the department's radio operators to seek assistance from the Secretary of State's office in Springfield in obtaining a specific address for the Gates. That office advised than an Illinois driver's license had been issued to a Lance Gates residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had, he claimed, provided reliable information to Mader during the previous two years. Upon examining certain financial records to which the informant had access, he reported a new address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the Secretary of State's office.

Upon inquiry, Mader was told by an officer of the Chicago police department assigned to O'Hare Airport that "L. Gates" had made a reservation with Eastern Airlines on its flight 245, which was to depart from O'Hare on May 5, at 4:15 p.m. The final destination of the flight was West Palm Beach, Florida.

On May 5, Mader was told by William Morely, an agent of the Drug Enforcement Administration, that "Lance Gates" had boarded Eastern Airlines flight 245 bound for Florida. The following day Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told him that he observed Gates and an unidentified woman leave the room at 7 a.m. and enter a red-vinyl-over-gray Mercury with 1978 Illinois license number RS 8437. Records at the Secretary of State's office showed that the license plate was registered for Lance B. Gates, but had been issued for a different automobile.

Based on the anonymous letter, the described information obtained from the law-enforcement authorities, and the verification of the address obtained from the confidential in-

formant, Mader, on May 6, sought and obtained in the circuit court of DuPage County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving in Florida.

At 5:15 a.m. on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by waiting Bloomingdale police officers. In the trunk of the Mercury the officers found several large bundles of marijuana weighing a total of approximately 350 pounds. A search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. Police also ascertained that the couple had cocaine in their possession. They were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm.

The defendants filed a pretrial motion to quash the search warrant and to suppress all physical evidence obtained as a result of the search, arguing that the anonymous letter did not set forth the underlying circumstances or manner in which the informant acquired the information or that the information was reliable as required under the test for probable cause described in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509. The defendants also argued that the separate evidence obtained by Detective Mader in his independent investigations did not corroborate the anonymous informant's accusations that the Gateses were involved in criminal activity so as to support the issuance of a search warrant based on probable cause. The motions to quash and to suppress evidence were allowed by the circuit court of DuPage County, and its action was affirmed by the appellate court (82 Ill. App. 3d 749). We granted the State's petition for leave to appeal. 73 Ill. 2d R. 315(a).

Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property. The determination of probable cause for the issuance of a search warrant must be made by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (*Johnson v. United States* (1948), 333 U.S. 10, 14, 92 L. Ed. 436, 440, 68 S. Ct. 367, 369.) This determination also must be based upon the sworn observations or on other sufficient facts or circumstances presented under oath before a magistrate. The Supreme Court in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, considering its decisions in *Giordenello v. United States* (1958), 357 U.S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245, *Johnson v. United States* (1948), 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367, *Nathanson v. United States* (1933), 290 U.S. 41, 78 L. Ed. 159, 54 S. Ct. 11, and *United States v. Lefkowitz* (1932), 285 U.S. 452, 76 L. Ed. 877, 52 S. Ct. 420, announced the constitutional standard to be used by courts in deciding whether a search warrant might properly issue when the complaint for the search warrant is based in whole or in part upon information supplied by an anonymous or unidentified informant. The court stated:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citation], the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation], was 'credible' or his information 'reliable.' " 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514.

The first part of this standard or test is often referred to as the "basis of knowledge prong" and the second part as the "veracity prong."

In *Aguilar*, an officer of the Houston police department applied for a search warrant on the ground that " 'reliable information [had been received] from a credible person' " that the defendant was known to have drugs on his premises for purposes of sale and personal use. The court described the affidavit as containing " 'no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein' " or "that the affiant's unidentified source 'spoke with personal knowledge.' " The court further stated that "the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' " (378 U.S. 108, 109, 113-14, 12 L. Ed. 2d 723, 725, 728-29, 84 S. Ct. 1509, 1511, 1513-14, quoting *Nathanson* and *Giordenello*.) The court held that the evidence obtained from a search conducted with the warrant was inadmissible and remanded the case for further proceedings.

The first prong, or the "basis of knowledge" part of the test announced in *Aguilar*, is concerned with the facts and circumstances showing that the informant knew that the person named has been or will be involved in criminal conduct. The most common means of satifying this requirement is by the informant's declaration that he is revealing personal knowledge gathered through some phsical sensory faculty such as that of sight, smell or sound. (See, *e.g.*, *Stanley v. State* (1974), 19 Md. App. 507, 531, 313 A.2d 847, 861.) Statements containing mere conclusions of criminal acivity without a statement regarding independent facts and personal observations do not

provide a sufficient basis for a neutral magistrate to decide to issue a search warrant.

Looking at the anonymous handwritten letter here one can only observe that it does not contain any statement showing that the information was acquired through firsthand or personal knowledge of the informant. The informant states that the defendants make their living by selling drugs but he does not set out the source of this knowledge or the ground for his conclusion. There is the statement that the defendants boasted of their illegal occupation, but one does not know whether they made these comments to the informant or whether this was hearsay. Similarly, the informant states that the defendants will be returning from Florida with over $100,000 in drugs and that there is over $100,000 worth of drugs in their basement. No basis of knowledge for this is given. There is no statement made that the informant ever saw drugs or was inside the defendants' residence or even that someone had told him of any of these claimed facts. The letter set out mere conclusions and contained no statements of personal observation or firsthand knowledge.

The second part of the *Aguilar* test, often, as noted, referred to as the "veracity prong," requires a showing of the underlying circumstances from which it was concluded that the informant was " 'credible' " or his information " 'reliable.' " (378 U.S. 108, 114-15, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514.) Though it is not necessary to consider this "prong" where the "basis of knowledge" part has not been satisfied, we shall comment on it because of the State's arguments discussed later relating to self-verifying detail and corroborating evidence as support for the search warrant here.

The name of an informant need not be revealed to the magistrate before a search warrant is issued so long as it is established that the informant is credible. This requirement is usually satisfied by reciting in the affidavit previous instances

in which the affiant police officer has obtained information from the informant that led to various arrests and convictions. (See *McCray v. Illinois* (1967), 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056; *People v. Garcia* (1975), 27 Ill. App. 3d 396.) Here, the informant's identity was not known to the affiant, Detective Mader. There was simply no basis on which either Mader or the magistrate could conclude that the anonymous person was credible.

The failure to satisfy under *Aguilar* that the informant was credible does not of itself mean that the "veracity prong" requirement cannot be met. It may be satisfied by a showing that the informant's tip was reliable. *United States v. Harris* (1971), 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075, shows that a plurality of the court considered that the alternative requirement of reliability of the information supplied was satisfied where the informant, in giving the information, admitted activities which were against his penal interest. In *Harris* a warrant was issued to Federal and local officers permitting them to enter and search the defendant's premises where they found containers of whiskey on which the Federal tax had not been paid. The affidavit accompanying the request for a warrant stated that information was received from an individual who claimed, as a confederate, personal knowledge that the defendant was a "trafficker of nontaxpaid distilled spirits." (403 U.S. 573, 575, 29 L. Ed. 2d 723, 729, 91 S. Ct. 2075, 2077.) The court held that the informant's admission of complicity with the defendant in these activities over an extended period of time, which subjected him to possible indictment under section 5205(a) of title 26 of the United States Code (26 U.S.C. sec 5205(a)), generated some measure of reliability. It was held that under the facts and circumstances of the case that probable cause had been established. Assuming, *arguendo*, that we were to follow the view of the plurality in *Harris* it would have no significance, because there was no admission against penal interest here.

Concluding that the letter standing alone cannot satisfy the requirements under *Aguilar*, we consider now the State's contention that the "self-verifying detail" within the letter, coupled with the corroborating nature of the information acquired by Detective Mader, established probable cause for the issuance of the search warrant.

The notion of "self-verifying detail" is found in *Spinelli v. United States* (1969), 393 U.S. 410, 417, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589. The court had granted *certiorari* "[b]elieving it desirable that the principles of *Aguilar* should be further explicated * * *." (393 U.S. 410, 412, 21 L. Ed. 2d 637, 641, 89 S. Ct. 584, 587.) There are important resemblances between the circumstances here and those in *Spinelli*. A search warrant had been issued, and the affidavit submitted in support of it cited a report from an unidentified informant and also one of an independent FBI investigation which was said to corroborate the informant's tip. The affidavit was more persuading than the one here. It described the informant as "a confidential, reliable informant" and stated that Spinelli was known to the affiant-special agent and to Federal and local law-enforcement officers as a gambler and bookmaker. According to the affidavit the informant had advised the FBI that Spinelli was operating a handbook and was using specified telephone numbers in its operation. The Supreme Court held that the affidavit was insufficient and that the search warrant had been issued without probable cause. The court observed: "Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information — it is not alleged that the informant personally observed Spinelli at work or that he

had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. [Citation.] In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (393 U.S. 410, 416, 21 L. Ed. 2d 637, 643-44, 89 S. Ct. 584, 589.) As can be said of the investigative activities by the law-enforcement officers here, the court in *Spinelli* stated: "[W]e find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion criminal conduct when taken by themselves — and they are not endowed with an aura of suspicion by virtue of the informer's tip." (393 U.S. 410, 418, 21 L. Ed. 2d 637, 645, 89 S. Ct. 584, 590.) The court commented that the report from the informant was meager and could easily have been obtained from an offhand remark heard at a neighborhood bar.

The court in *Spinelli* did say that while an affidavit may not satisfy the "basis of knowledge" prong of the *Aguilar* test by failing to set out adequately the circumstances explaining how the confidential information was obtained, this may be cured if the information set out is so detailed that a magistrate "could reasonably infer that the informant had gained his information in a reliable way." (393 U.S. 410, 417, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589.) Thus an informant's report, if detailed sufficiently, may in effect verify itself in the sense that the magistrate, when presented with such detail, can

reasonably infer that the informant had gained his information is a reliable way and may be a sufficient basis for a magistrate's finding of probable cause for the issuance of a search warrant. The court cited *Draper v. United States* (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, a pre-*Aguilar* decision, as a "suitable benchmark" upon which to measure this sufficiency of detail. (393 U.S. 410, 416, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589.) It is important to observe that in *Draper* there was not, as here or in *Spinelli,* an anonymous or unidentified informant but a named informant whose information, when given to law-enforcement officers on earlier occasions, had been reliable.

The use of self-verifying detail to find probable cause is limited, though, to a situation where the informant has not otherwise disclosed the manner in which he has obtained his information and thus has failed to satisfy the "basis of knowledge" prong. While the specificity of detail may be used to supply the basis-of-knowledge requirement, it cannot establish that the informant was credible or his information reliable, in and of itself, so as to meet *Aguilar's* "veracity" prong. The court in *Stanley v. State* (1974), 19 Md. App. 507, 533, 313 A.2d 847, 862, described this when it observed: "The notion that great detail implies personal observation rather than the over-hearing of barroom gossip, presupposes an honest informant. If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes. Minute detail tells us nothing about 'veracity.' " See also *People v. Linder* (1975), 24 Ill. App. 3d 995; Note, *Probable Cause And The First-Time Informer: United States v. Harris,*, 403 U.S. 573 (1971), 43 Colo. L. Rev. 357, 362 (1972).

Self-verifying detail discussed in *Spinelli* as a means of satisfying the basis-of-knowledge prong must be accepted with great circumspection. This was expressed by Mr. Justice

Harlan when, as appears in the quotation above from *Spinelli,* he cautioned that the tip must describe the claimed criminal activity in detail adequate to show the magistrate that he is relying on information more substantial than casual rumor or an accusation founded only on the accused's general reputation. We cannot say that the information provided here was in sufficient detail to lead a magistrate to conclude that the tip was the product of firsthand knowledge or personal observation.

That the anonymous informant gave the name of the street where the defendants resided and stated that they would be driving from Florida in early May with drugs in the trunk of their car does not even meet the specificity of detail required by the court in *Draper v. United States* (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, so as to cure the existing deficiency of the "basis of knowledge" prong. Nor can it be reasonably concluded that the information in the letter was acquired through first-hand knowledge rather than by rumor. Also, we reiterate and emphasize that here the informant was anonymous. In *Draper* the informant was named and identified as one who earlier had given information to law-enforcement officers that had been reliable.

The corroborative evidence gathered by Detective Mader, when coupled with the "detail" of the informant's letter, did not constitute probable cause under the tests of *Aguilar.* The appellate court, in addressing this question of corroborative evidence, rejected the State's contention that corroboration can be used to satisfy the "veracity" prong as well as the "basis of knowledge" prong of the *Aguilar* test. The court held that partial corroboration may be considered only to support the contention that the information obtained was reliable. Citing *Stanley v. State* (1974), 19 Md. App. 508, 531, 313 A.2d 847, 861-62, the court held that corroboration may not serve as a means of satisfying the "basis of knowledge" prong.

Courts are not in agreement on the question of whether partial corroboration, combined with an informant's tip, may cure a deficiency in either prong of the *Aguilar* test. See, *e.g.*, 1 LaFave, Search and Seizure sec. 3.3 (1978); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974); *Stanley v. State* (1974), 19 Md. App. 507, 313 A.2d 847.

We need not consider this question, however, since the nature of the corroborating "evidence" in this case would satisfy neither the "basis of knowledge" nor the "veracity" prong of *Aguilar*. Looking to the affidavit submitted as support for Detective Mader's request that a search warrant issue, we note that the corroborative evidence here was only of clearly innocent activity. Mader's independent investigation revealed only that Lance and Susan Gates lived on Greenway Drive; that Lance Gates booked passage on a flight to Florida; that upon arriving he entered a room registered to his wife; and that he and his wife left the hotel together by car. The corroboration of innocent activity is insufficient to support a finding of probable cause. See *Whiteley v. Warden of Wyoming State Penitentiary* (1971), 401 U.S. 560, 567, 28 L. Ed. 2d 306, 312-13, 91 S. Ct. 1031, 1036.

For the reasons given above, the judgment of the appellate court is affirmed.

Judgment affirmed.

MR. JUSTICE MORAN, dissenting:

The majority concludes that the letter combined with the facts gleaned from the police investigation does not satisfy either prong of the *Aguilar* test. I disagree. As the opinion points out, the letter did not reveal that the informant had personal knowledge of the criminal activity, the method by which the "basis of knowledge" prong is generally satisfied.

However, that prong can be satisfied by sufficiently specific detail and corroborating information. (*Spinelli v. United States* (1969), 393 U.S. 410, 416-17, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589.) That the necessary specificity of the initial information and the requisite corroboration were present here can be demonstrated by a comparison with three United States Supreme Court cases.

Draper v. United States (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, involved an arrest without a warrant. There, an informant gave a Federal narcotics agent information regarding narcotics law violations. On a motion to suppress, the agent testified that he "had always found the information given by [the informant] to be accurate and reliable." (358 U.S. 307, 309, 3 L. Ed. 2d 327, 329, 79 S. Ct. 329, 331.) No underlying facts established this conclusion. However, the informant told the agent that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. In addition, the informant described Draper's physical appearance, the clothes he was wearing, that he would be carrying a tan zipper bag, and that he walked quickly. The court found that the agent had probable cause to arrest when a man fitting Draper's description stepped off the specified train.

In *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, police officers, in support of their application for a search warrant, submitted an affidavit stating:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (378 U.S. 108, 109, 12 L. Ed. 2d 723, 725, 84 S. Ct. 1509, 1511.)

The court found that the information merely reflected the informant's " 'suspicion,' 'belief' or 'mere conclusion.' " (378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514.) In so holding, it established the two-pronged standard for evaluating if a search warrant should issue:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation], was 'credible' or his information 'reliable.'" 378 U.S. 108, 114, 12 L. Ed. 2d 723, 729, 84 S. Ct. 1509, 1514.

With this test as the standard, the Supreme Court decided *Spinelli v. United States* (1969), 393 U.S. 410, 21 L. Ed. 637, 89 S. Ct. 584. In that case, the affidavit stated that Spinelli was known to law-enforcement agents as a bookmaker and a gambler, and that the FBI had "been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of telephones which have been assigned and numbers WYdown 4-0029 and Wydown 4-0136." 393 U.S. 410, 414, 21 L. Ed. 2d 637, 642, 89 S. Ct. 584, 588.

The court contrasted the informant's tip with the information provided by the informant in *Draper*. The court concluded that a magistrate could infer from the tip in *Draper* that the informant had gained his information in a reliable way whereas, in the case before it, the report could have been obtained from an offhand remark heard at a neighborhood bar. The court also found that the investigative police work in *Draper* corroborated much more than one small detail and resulted in the inference that the report was reliable. In contrast, the investigation in *Spinelli* corroborated only that Spinelli could have used two telephones for gambling or for

some other purpose, and was insufficient to support the reliability of the information. The court stated:

> "[In *Draper*], the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established." 393 U.S. 410, 417-18, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 590.

When comparing the affidavits in *Aguilar* and *Spinelli* and the testimony of the agent in *Draper* to the affidavit here, it is clear that this case is more similar to *Draper*, than to *Aguilar* and *Spinelli*. In *Aguilar*, the information in the affidavit consisted of mere conclusions and did not satisfy either prong of the standard established here. Similarly, in *Spinelli* the affidavit did not contain a sufficient statement of the underlying circumstances from which the magistrate could conclude that the informer had knowledge that Spinelli was running a bookmaking operation. Further, the court found that although the affiant swore that his confidant was reliable, he offered the magistrate no reason in support of this conclusion.

In this case, however, as in *Draper*, a specific, detailed and *future* sequence of events was supplied by the informant's letter. As already stated, in *Draper* the tip was that a man fitting a particular description had gone to Chicago and would be arriving on a particular train in Denver on one of two specified mornings carrying three ounces of heroin. Here, the letter revealed that on May 3, in compliance with their usual procedure, Sue Gates would be driving down to Florida to purchase drugs. It further stated that Lance Gates would be flying down a few days later to drive their car back to

Bloomingdale carrying over $100,000 in drugs in the trunk. The police investigation showed that on May 5 a person matching Lance Gates' description flew to West Palm Beach, Florida, and proceeded to the Holiday Inn West to a room registered to Susan Gates. On May 6, 7 a.m., Gates and an unidentified female left the motel driving a red-vinyl-over-gray Mercury. The investigation disclosed that Gates and the woman left the West Palm Beach area driving northbound on an interstate highway and that the driving time to Bloomingdale was 21 to 23 hours. In this case, as in *Draper,* every detail of the informant's information was corroborated by the police investigation. The specific, detailed information in the letter combined with the corroboration clearly indicates that the informant had an underlying basis of knowledge, satisfying *Aguilar's* first prong.

In addition, the specific information contained in the letter which was then corroborated proved the informant's statements to be credible and reliable, thereby satisfying *Aguilar's* second prong. The majority opinion attempts to distinguish *Draper* by observing in that case there was a named informant who had given the agent reliable information on other occasions. However, the agent's statement as to the informant's reliability was a mere conclusion. It is questionable whether that naked assertion would satisfy *Aguilar's* second prong in that it does not present any underlying circumstances from which the judge could determine if the informant is credible or his information reliable. That statement is not essentially different from the one made in *Spinelli* that the "informant was reliable." The point is, however, that under the court's analysis in *Spinelli,* the result in *Draper,* in light of *Aguilar,* does not hinge on the mere averment that the informant had previously given reliable information. Rather, the determining factor in establishing probable cause and complying with both prongs of *Aguilar* is the specificity of the tip combined with the police verification by investigation.

Finally, the majority, citing *Whiteley v. Warden of Wyoming State Penitentiary* (1971), 401 U.S. 560, 567, 28 L. Ed. 2d 306, 312-13, 91 S. Ct. 1031, 1036, finds that the corroborating information combined with the tip would not satisfy either prong of the *Aguilar* test because the corroborating evidence was of clearly innocent activity. This conclusion is incorrect. First, in *Whiteley,* the corroborating evidence was simply that the sheriff knew the defendants and the kind of car they drove. The court in *Whiteley* specifically stated:

> "[T]he additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony." 401 U.S. 560, 567, 28 L. Ed. 2d 306, 312-13, 91 S. Ct. 1031, 1036.

In *Draper,* the corroborating information also related to innocent acitivity — a man fitting a particular description stepped off a train on a specific day carrying a tan zipper bag. Yet, the court in *Whitley,* as well as in *Spinelli,* clearly held that this type of detailed information can be used to corroborate an informant's tip. The key is whether the corroborative evidence is endowed with an aura of suspicion by virtue of the informant's tip. (See *Spinelli v. United States* (1969), 393 U.S. 410, 418, 21 L. Ed. 2d 637, 645, 89 S. Ct. 584, 590.) In this case, just as in *Draper,* seemingly innocent activity became suspicious in light of the initial tip.

Here, the police went through the desired procedure of obtaining a warrant. The judge had before him, by way of affidavit, information from which he reasonably could conclude that the informant had knowledge that the Gates were involved in criminal activity and that the information was reliable. Under the standard enunciated in *Spinelli,* the judge could conclude he was relying on more than casual rumor or reputation and that the report had not been fabricated "out

of whole cloth." (See *Spinelli v. United States* (1969), 393 U.S. 410, 416, 417, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 590.) Probable cause was determined by a neutral and detached judge. (See *Johnson v. United States* (1948), 333 U.S. 10, 14, 92 L. Ed. 436, 440, 68 S. Ct. 367, 369.) Issuance of a search warrant in the instant case is consistent with the rationale underlying *Aguilar,* as applied in *Spinelli,* and does not attenuate one's right to be free from unreasonable searches and seizures as guaranteed by the United States and Illinois constitutions.

For the above-stated reasons, I must respectfully dissent.

MR. JUSTICE UNDERWOOD joins in this dissent.

APPELLATE COURT OPINION
(Filed April 1, 1980)

NO. 78-570

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

LANCE GATES AND SUSAN GATES,
Defendant-Appellees.

Appeal from the Circuit Court of the 18th Judicial Circuit, DuPage County, Illinois

Mr. JUSTICE LINDBERG delivered the opinion of the court.

The State appeals on order entered by the Circuit Court of DuPage County which quashed a search warrant and suppressed the evidence seized pursuant to the authority of the warrant. At issue is whether the warrant was sufficient under the standards set forth in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed. 2d 723, 84 S. Ct. 1509, and *Spinelli v. United States* (1969), 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584. We affirm.

The facts are straightforward. On May 3, 1978, the Bloomingdale Police Deparment received a handwritten, anonymous letter which had no return address. The letter recited as follows:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Road, in the condominiums. Most of their buys are done in Florida. Sue his wife drives their

car to Florida, where she leaves it to be loaded up with drugs, than flys [*sic*] back after she drops the car off in Florida. May 3, she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000 worth of drugs in their basement.

"They brag about the fact that they never have to work, and make their entire living on pushers.

"I guarentee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Lance and Sue Gates
Greenway
In Condominiums"

On the same day the letter was received, Detective Charles Mader of the Bloomingdale Police Department made an inquiry to the Secretary of State's Office regarding the driver's license of one Lance Gates. The computer reply stated that an Illinois Drivers License had been issued to a Lance B. Gates, whose address was listed at 209 D, Dartmouth Drive, Bloomingdale, Illinois. His physical description was given as follows:

Sex — Male
Date of Birth — July 13, 1947
Height — 5' 11"
Weight — 220 pounds
Hair — Brown
Eyes — Brown

Later the same day, Detective Mader contacted a confidential informant. Detective Mader had known this informant for approximately two years during which time the informant had provided the detective with information which resulted in seven criminal convictions. This informant told the Detective

that Lance B. Gates' current address was 198 B. Greenway Drive, Bloomingdale, Illinois.

Detective Mader then called Officer Ott of the Chicago Police Department who at that time was assigned to O'Hare Airport. Officer Ott reviewed flight information and stated that L. Gates, phone number 980-8427, was scheduled to depart Chicago-O'Hare on May 5, 1978, on Eastern Airlines Flight 245, departing at 4:15 p.m. The flight was scheduled from Chicago to Atlanta and then to West Palm Beach, Florida.

Detective Mader then told the radio operator at the Bloomingdale Police Department to call the Security Office of the Illinois Bell Telephone Company. The radio operator was told that telephone number 980-8427 was a non-published number issued to Lance B. Gates whose address is 189 B Greenway Drive, Bloomingdale, Illinois.

On May 5, 1978, Detective Mader was telephoned by Agent William Morely of the Drug Enforcement Agency. He told Mader that, pursuant to a prior arrangement with the Detective, he had maintained a surveillance on all passengers boarding Flight 245. He told Mader that a person matching the description of, and using the name Lance Gates had boarded the flight.

Agent Morely called Mader the next day and told him that an agent in Florida had just completed a surveillance on Lance Gates in West Palm Beach. This Florida agent told Morely that he observed the defendant remain in the airport for approximately one hour after his arrival. He next saw him take a taxi which the agent followed to the Holiday Inn in West Palm Beach. The defendant went to a room which was registered to Susan Gates. At approximately 7:00 a.m. on May 6, 1978, the Florida agent saw Lance Gates and a female leave the room, go to the parking lot, and get in a red vinyl

over gray Mercury bearing Illinois license plates RS8437. The Florida agent followed this Mercury northbound to an interstate which is commmonly used by travelers to the Chicago area. At that point the surveillance was terminated.

Agent Morely also told Detective Mader that the license plate RS8437 was registered to the defendant but for a 1975 Hornet station wagon. Finally Agent Morely advised the Detective that the approximate driving time from West Palm Beach to Bloomingdale is 21-23 hours.

A complaint for search warrant was prepared and presented for approval to an associate judge. The complaint attached an affidavit signed by Detective Mader, which recited substantially the same facts as set forth above, and included a copy of the anonymous note as an attachment to the affidavit.[1] The request for the issuance of the warrant was approved, and a search warrant was issued authorizing police to search the person of both defendants, their condominium located on Greenway in Bloomingdale, and the gray Mercury driven by Lance Gates.

On May 7, 1978 at approximately 5:15 a.m., Lance and Susan Gates arrived at the residence of 198 B Greenway Drive, in Bloomingdale. Pursuant to the warrant, the police searched the car and found "seven large burlap bundles of cannabis" weighing in excess of 400 pounds. The residence was then searched, and police discovered numerous rifles, a handgun, a green garbage can containing approximately twenty pounds of cannabis, three-fourths of a bale of cannabis, numerous baggies and hand-rolled cigarettes containing cannabis, and assorted weighing devices.

Both defendants were arrested and later were indicted on various narcotics and firearms' charges. Prior to trial, a mo-

---

[1] The text of the affidavit is set out in full in the appendix.

tion to quash the arrest and suppress evidence was filed on behalf of both defendants. The basis of the defendants' motion was that the warrant failed to comply with the requirements of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 723, 84 S. Ct. 1509, in that the author of the anonymous letter was not "reliable" and that there was no showing that his or her information was obtained in a reliable manner. After a hearing, the trial court granted the defendants' motion to quash and suppress, and the State appeals.

The Fourth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment, requires that search warrants be issued only upon a showing of "probable cause." Whenever a search warrant is sought on the basis of information supplied by an anonymous informant, it is necessary that the judge or magistrate issuing the warrant be provided with sufficient facts and circumstances from which he can determine the reliability of the informer and the accuracy of his present information so that the constitutional requirement or probable cause may be satisfied. *People v. Thomas* (1975), 62 Ill. 2d 375, 378, 342 N.E. 2d 383, 384, *People v. Isenberg* (1977), 52 Ill. App. 3d 426, 429, 367 N.E. 2d 364.

The leading case of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed. 2d 723, 84 S. Ct. 1509, set forth a two-prong test to be applied by a judge or magistrate in testing the sufficiency of an affidavit filed in support of the insurance of a search warrant: first, the judge must be informed of some of the underlying circumstances from which the informant concluded that the defendants were involved in criminal activity (the "basis of knowledge" prong); and secondly, the judge must be informed of some of the underlying circumstances from which the affiant concluded that the informer of his information was worthy of belief (the "veracity" prong). The veracity prong of the *Aguilar* test may be, satisfied by showing either

that the informant, whose identity need not be disclosed, is "credible" the ("credibility" spur) or that his information is "reliable" (the "reliability" spur). *Aguilar,* 378 U.S. at 114-115, 12 L.Ed. 2d at 729, 84 S. Ct. at 1514.

Pursuant to the test set forth in *Aguilar,* the first question we must address in this case is whether the affidavit was sufficient to inform the issuing judge of the underlying circumstances from which the anonymous informant reached his conclusions that defendants were engaged in criminal conduct. The affidavit attached to the complaint for search warrant does not reveal the manner in which the anonymous informer obtained or gathered his information. (*Cf. People v. Gomes* (1980), 80 Ill. App. 3d 668, 399 N.E.2d 1030 (informant had personal knowledge that crime had been committed); *People v. Swift* (1978), 61 Ill. App 3d 486, 378 N.E.2d 234 (informer was requested by defendant to participate in crime.) Thus our inquiry turns to whether the judge could reasonably infer that the information was gained in a reliable fashion because of the great amount of detail supplied by the informer. *Spinelli v. United States* (1968), 393 U.S. 410, 417, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, ____. In *Spinelli,* the Supreme Court utilized the detail provided by the informant in *Draper v. United States* (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, as an example of the detail required to satisfy the basis of knowledge prong of the *Aguilar* test.

Using *Draper* as a standard, we are of the opinion that the information supplied by the anonymous informer does not contain sufficient detail to allow the issuing judge to reasonably infer that the informer had obtained his information in a reliable way. The anonymous letter contains no more than general allegations that defendants were involved in narcotics sales. Although the anonymous informer did state that the Gates would soon drive to Florida and return with a load

of drugs in their car, no details regarding this trip were set forth in the letter. These general allegations fall far short of the specifics necessary for a judge to properly infer that the anonymous informer had gathered his information in a reliable way. Nor could the judge reasonably assume that the anonymous informer had personal knowledge on the basis of the statements set forth in the anonymous letter. In contrast to the case at bar, the informer in *Draper* supplied police with a detailed physical description of the accused, the time and date of his arrival in Denver by train, and a description of the clothes he would be wearing. The informer also stated that the accused had a habit of walking very fast. (*Draper,* 358 U.S. at 309-10, 3 L. Ed. 2d at 330, 79 S. Ct. at ____.) When confronted with such detail, a judge could reasonably infer that the informer either had personal knowledge of the transaction or had obtained his information in a reliable way. The informer in the instant case set forth few details, however, and he may have obtained his information through rumor or through another unreliable method. Hence, the affidavit fails to meet the basis of knowledge requirements set forth in *Spinelli* and *Aguilar*.

The State argues that there is "substantial basis" for crediting the information supplied by the anonymous informant because the allegations set forth in the handwritten letter were fully corroborated by other independent sources. We cannot agree. Partial corroborration of an informant's story may show his information to be "reliable;" however, such corroboration only satisfies the second prong of the *Aguilar* test, i.e., the veracity prong. Corroboration does not establish that the informer obtained his information in a reliable manner. (1 La Fave, Law of Search and Seizure: A Treatise on the Fourth Amendment, sec. 3.3.) As stated by the court in the

well-reasoned case of *Stanley v. State* (1974), 19 Md.App. 508, ____, 313 A.2d 847, 861-62:

> "[T]he 'independent verification' technique cannot repair a defect in the 'basis of knowledge' prong. *Verifying the truth of part of a story does nothing to ascertain the story's source or to check the informant's perhaps invalid conclusions.* ***
>
> An informant who does not speak from personal knowledge may well be passing on an amalgam of underworld rumor and barroom gossip. If that be true, the verification of one contributing rumor would do nothing for the 'veracity' of other contributing rumors. An informant may have *** then received incriminating information from a third party lending inculpatory color to those observations. Merely verifying the informant's innocuous observations does nothing to verify the crucial third party who supplied the damning catalyst." (Emphasis ours.) (Accord, *United States v. Hamilton* (9th Cir. 1974), 490 F.2d 598, *Garner v. State* (Del. 1973), 314 A.2d 908.)

Were we to accept the State's argument, we would permit government invasion of the privacy of persons solely on the basis of anonymous tips, made perhaps out of spite or based upon unsubstantiated rumor, merely because innocent details have been verified by the observations of a police officer. Although some federal and state courts have accepted the position advanced by the State in this case (see e.g., *United States v. Tuley* (5th Cir. 1977), 546 F.2d 1264 (over dissent); *United States v. Myers* (D.C. Cir. 1976), 538 F2d 424 (over dissent); *Horton v. State* (1977), 262 Ark. 211, 555 S.W.2d 226, *State v. Gilbert* (1976), 24 Or. App. 907, 547 P.2d 632), we believe that neither the theory nor the cases are sound and we refuse to follow them.

In view of our determination that the affidavit failed to satisfy the basis of knowledge prong of the *Aguilar* test, we

need not address any other issues in this case. For the reasons stated above, the order of the Circuit Court of DuPage County is affirmed.

AFFIRMED.

SEIDENFELD, NASH, concur.

APPENDIX

Affidavit filed in support of complaint for search warrant:

"I, CHARLES J. MADER, am a detective employed by the Bloomingdale Police Department, DuPage County, Illinois. I have been so employed for the past five years. On May 3, 1978, I received a letter sent by an unknown citizen to the Bloomingdale Police Department. I received the letter and the envelope in which it was sent from Chief Patrick J. McMahon. A copy of the letter and a transmittal envelope are attached hereto and incorporated herein by reference.

"On May 3, 1978, I directed a Bloomingdale Police Department radio operator to make a SOUNDEX drivers license name inquiry with the Illinois Secretary of State, Springfield, Illinois to determine whether they had any record of a LANCE GATES residing in Bloomingdale, Illinois. The SOUNDEX response established that one LANCE B. GATES was issued an Illinois drivers license which listed his address as 209 D. Dartmouth, Bloomingdale, Illinois. A copy of the response sent by the Secretary of State is attached hereto and incorporated herein by reference.

"On May 3, 1978, I contacted a confidential informant known to me for the past two year period, I have received information from this person several dozen times, resulting in seven criminal arrests with convictions in all cases. This confidential informant reviewed certain financial records available to him and told me that he located one LANCE B. GATES residing at 198 B. Greenway Drive, Bloomingdale, Illinois. He also informed me that GATES' previous address was 209 D. Dartmouth, Bloomingdale,

CONTINUED ON PAGE 2

COMPLAINT FOR SEARCH WARRANT NUMBER S 1603 CONTINUATION OF AFFIDAVIT OF CHARLES J. MADER PAGE TWO

"On May 3, 1978, I contacted Officer Ott of the Chicago Police Department at O'Hare Airport. Officer Ott checked certain flight information available to him and told me that one L. GATES, phone number 980-8427, was registered on Eastern Airlines Flight number 245, scheduled to depart O'Hare on 4:15 P.M. on May 5, 1978. Officer Ott told me that Flight 245 travels from Chicago to Atlanta and then to West Palm Beach, Florida.

"I then directed the radio operator to contact the Security Office of Illinois Bell Telephone Company and was told by the radio operator that 980-8427 was a non-published phone numer issued to LANCE GATES at 189 B. Greenway Drive, Bloomingdale, Illinois.

"On May 5, 1978, I was contacted by Agent William Morely of the Drug Enforcement Administration. He state that, pursuant to prior arrangement between us, he had maintained a surveillance on all passengers boarding Eastern Airlines Flight number 245. He stated further that in individual using the name LANCE GATES and matching the physical description furnished by Secretary of State in the attached message boarded Flight 245 bound for Florida.

"On May 6, 1978, Agent Morely contacted me and said that Drug Enforcement Administration agents in Florida had just completed a surveillance of LANCE GATES in West Palm Beach, Florida. He told me that the Federal agents in Florida observed:

1. GATES arrive in West Palm Beach, Florida via Eastern Flight Number 245 and remain in the airport for one hour before taking a taxi to the West Palm Beach Holiday Inn;

2 . The room he entered was registered to one SUSAN GATES;

3 . At 7:00 AM May 6, 1978, LANCE GATES and a female left the Holiday Inn Room registered to SUSAN GATES, and entered a red vinyl over gray Mercury bearing Illinois 1978 license RS 8437;

4 . LANCE GATES and the female left the West Palm Beach area driving the Mercury northbound on that interstate highway commonly used by travelers to the Chicago area.

"Agent Morely further told me that a check of the records of the Illinois Secretary of State revealed that license RS 8437 registers to LANCE B. GATES on a 1975 Hornet station wagon.

"Agent Morely also told me that the driving time from West Palm Beach, Florida to Bloomingdale, Illinois is approximately 21-23 hours."

"/s/ DET. CHARLES J. MADER

Complainant"

"PAGE TWO OF TWO PAGES

"s/ SUSCRIBED AND SWORN
TO BEFORE ME ON MAY 6, 1978

S. K. LEWIS
Assoc. Judge"

United States of America

State of Illinois,
Appellate Court,
Second District, } ss.

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 1st day of April, A.D. 1980.

/s/ LOREN J. STROTZ

Clerk Appellate Court, Second District.

Supplemental Brief

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS

No. 81-430

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

PETITIONER,

VS.

LANCE GATES AND SUSAN GATES,

RESPONDENTS.

On Writ Of Certiorari To
The Supreme Court Of Illinois

MOTION FOR LEAVE TO AMEND OR ENLARGE QUESTION PRESENTED FOR REVIEW

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MOTION FOR LEAVE TO AMEND OR ENLARGE QUESTION PRESENTED FOR REVIEW

Petitioner, the State of Illinois, by its attorney, TYRONE C. FAHNER, Attorney General of the State of Illinois, moves the Court to grant petitioner leave to amend or enlarge the question presented by its Petition for Certiorari to include the issue of whether the recently recognized good faith exception to the exclusionary rule precludes application of the Fourth

Amendment exclusionary rule to the present case. Petitioner presents this Motion pursuant to Rules 42 and 21(1)(a) of the Rules of the Supreme Court of the United States.

In support of the above Motion petitioner states as follows:

1. On August 23, 1981, the State of Illinois filed the Petition for Writ of Certiorari in the above-captioned case and formulated the following single question presented for review:

> Whether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?

Petition at i.

2. This Court granted certiorari on January 11, 1982, in a brief order that made no reference to the question presented; the joint appendix and brief for petitioner were ordered filed by February 25, 1982 and the case was tentatively scheduled for argument in April.

3. On November 3, 1981, this court granted certiorari in *Taylor v. Alabama*, No. 81-5152, 50 U.S.L.W. 3351, a case in which the Supreme Court of Alabama decided, *inter alia*, that it would be improper to apply the exclusionary rule to the fruit of an illegal arrest (a confession) where the police were justified at the time of the arrest in their good faith belief that the arrest was made on probable cause. *Taylor* will be argued in March. Both the State of Alabama and the amici supporting the State have made an argument based on the good faith exception to the exclusionary rule, first given significant judicial recognition in *United States v. Williams*, 622 F.2d 830, 846-7 (5th Cir. en banc, 1980), *cert. den.*, 101 S. Ct. 946 (1981).

4. Although the good faith exception was not raised in the present Petition, not argued directly by the State's Attorney in

the Illinois courts and not discussed in the opinions of the Illinois reviewing courts, the State of Illinois urges, based upon this Court's decisions waiving the strict requirements of the predecessors to United States Supreme Rules 21(1)(a) and (h), that the Question Presented be amended or enlarged to include the following:

> Assuming, arguendo, that the information used to obtain the search warrant did not satisfy *Aguilar v. Texas*, 378 U.S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?

5. This Court has in the past granted motions by petitioners to amend their Questions Presented to add issues in cases which were taken on certiorari. E.g., *Costello v. United States*, 362 U.S. 973, 365 U.S. 265, 284-85 (1961).

Also the Court has expressed its willingness to consider points not raised and preserved below where changes are occurring in the law which will culminate in the overruling or limiting of an authority or where a basic unfairness might escape review if the Rules were strictly applied. *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 319-321 (1971); *Erie Railroad Co. v. Tompkins*, 304 U.S. 54, 66 (1938). See dissenting opinion of Mr. Justice Black in *Standard Industries v. Tigrett, Inc.*, 397 U.S. 586, 587 (1970) in which he maintained that the Court had frequently allowed parties to raise issues for the first time on appeal when there had been a significant change in the law since the trial. See also, Stern & Gressman, *Supreme Court Practice*, (5th edition, 1978), sect. 6.27.

The present case was heard in the Illinois trial court and briefed on direct appeal by the State *before* the good faith exception to the exclusionary rule was adopted by any reviewing court in a significant, published opinion. Thus, petitioner's motion to enlarge the question presented comes within the

circumstances and rulings in the *Costello* and *Blonder-Tongue* cases where the additional issues raised were considered by this Court.

6. The facts leading to execution of the search warrant in the present case make it a particularly appropriate one in which to consider adopting and applying the good faith exception to the exclusionary rule. Before searching the Gates' clothing, car, and residence for drugs, police respected the judicial preference for search warrants, going first to an assistant state's attorney to write up a complaint and then before an associate judge for a warrant. The complaint for search warrant covered two pages and was based upon official surveillance of the Gates' activities as well as on the detailed informant's letter (R.C. 131 and 136). When the warrant was properly executed seven hours later, police recovered 400 lbs. of cannabis from the Gates' car, approximately one bale of cannabis found near weighing and distribution supplies in the house and numerous firearms (R.C. 133-4). The decision to suppress evidence obtained during the search was based upon the alleged technical failure of the complaint for a warrant to satisfy the test set down by this Court in *Aguilar v. Texas*, 378 U.S. 108 (1964).

The record in this case establishes that police acted on the reasonable good faith belief that the assistant state's attorney and judge knew the law of search and seizure and produced a valid warrant. The history of this litigation demonstrates that the police and state's attorney cannot be faulted for failing to identify an *Aguilar* flaw in the complaint. The issuing judge and trial judge differed on the sufficiency of the complaint. Furthermore, the Illinois Appellate Court and the Supreme Court of Illinois seem to have differed on whether the complaint satisfied one prong of the *Aguilar* test, while one of the most experienced members of the Supreme Court, Justice Moran, dissented from the majority's opinion and found the

warrant totally valid. (Appendix to Petition, pp. 12a, 18a and 7-8b).

WHEREFORE, petitioner asks that this Honorable Court grant its Motion to Amend or Enlarge the Question Presented for Review.

Respectfully submitted,

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State of Illinois

BY: _____
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Joint Appendix

Supreme Court, U.S.
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No. 81-430

In the Supreme Court of the United States

THE STATE OF ILLINOIS,
Petitioner,

v.

LANCE GATES AND SUSAN GATES,
Respondents.

On Writ of Certiorari To
The Supreme Court of Illinois

JOINT APPENDIX

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SUPREME COURT OPINION

Docket No. 53453 — Agenda 6 — January 1981.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,
v. LANCE GATES *et al.*, Appellees.

MR. JUSTICE WARD delivered the opinion of the court:

On May 3, 1978, the Bloomingdale police department received by mail an anonymous handwritten letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
>
> Lance & Sue Gates
> Greenway
> in Condominiums."

The chief of police delivered the letter to Charles Mader, a detective of the Bloomingdale police department and he requested one of the department's radio operators to seek assistance from the Secretary of State's office in Springfield in obtaining a specific address for the Gates. That office advised that an Illinois driver's license had been issued to a Lance Gates residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had, he claimed, provided reliable information to Mader during the previous two years. Upon examining certain financial records to which the informant had access, he reported a new address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the Secretary of State's office.

Upon inquiry, Mader was told by an officer of the Chicago police department assigned to O'Hare Airport that "L. Gates" had made a reservation with Eastern Airlines on its flight 245, which was to depart from O'Hare on May 5, at 4:15 p.m. The final destination was West Palm Beach, Florida.

On May 5, Mader was told by William Morely, an agent of the Drug Enforcement Administration, that "Lance Gates" had boarded Eastern Airlines flight 245 bound for Florida. The following day Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told him that he observed Gates and an unidentified woman leave the room at 7 a.m. and enter a red-vinyl-over-gray Mercury with 1978 Illinois license number RS 8437. Records at the Secretary of State's office showed that the license plate was registered for Lance B. Gates, but had been issued for a different automobile.

Based on the anonymous letter, the described information obtained from the law-enforcement authorities, and the verification of the address obtained from the confidential informant, Mader, on May 6, sought and obtained in the circuit court of DuPage County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving in Florida.

At 5:15 a.m. on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by waiting Bloomingdale police officers. In the trunk of the Mercury the officers found several large bundles of marijuana weighing a total of approximately 350 pounds. A search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. Police also ascertained that the couple had cocaine in their possession. They were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm.

The defendants filed a pretrial motion to quash the search warrant and to suppress all physical evidence obtained as a result of the search, arguing that the anonymous letter did not set forth the underlying circumstances or manner in which the informant acquired the information or that the information was reliable as required under the test for probable cause described in *Aguilar v. Texas* (1964), 378 U.S. 108,-12 L.Ed. 2d 723, 84 S.Ct. 1509. The defendants also argued that the separate evidence obtained by Detective Mader in his independent investigations did not corroborate the anonymous informant's accusations that the Gateses were involved in criminal activity so as to support the issuance of a search warrant based on probable cause. The motions to quash and to suppress evidence were allowed by the circuit

court of DuPage County, and its action was affirmed by the appellate court (82 Ill. App. 3d 749). We granted the State's petition for leave to appeal. 73 Ill. 2d R. 315(a).

Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property. The determination of probable cause for the issuance of a search warrant must be made by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (*Johnson v. United States* (1948), 333 U.S. 10, 14, 92 L.Ed 436, 440, 68 S.Ct. 367, 369.) This determination also must be based upon the sworn observations or on other sufficient facts or circumstances presented under oath before a magistrate. The Supreme Court in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509, considering its decisions in *Giordenello v. United States* (1958), 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245, *Johnson v. United States* (1948), 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367, *Nathanson v. United States* (1933), 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11, and *United States v. Lefkowitz* (1932), 285 U.S. 452, 76 L.Ed. 877, 52 S.Ct. 420, announced the constitutional standard to be used by courts in deciding whether a search warrant might properly issue when the complaint for the search warrant is based in whole or in part upon information supplied by an anonymous or unidentified informant. The court stated:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant [citation], the magistrate must be informed of some of the underlying circumstances from which the information concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which

> the officer concluded that the informant, whose identity need not be disclosed [citation], was 'credible' or his information 'reliable.'" 378 U.S. 108, 114, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514.

The first part of this standard or test is often referred to as the "basis of knowledge prong" and the second part as the "veracity prong."

In *Aguilar,* an officer of the Houston police department applied for a search warrant on the ground that "'reliable information [had been received] from a credible person'" that the defendant was known to have drugs on his premises for purposes of sale and personal use. The court described the affidavit as containing "'no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein'" or "that the affiant's unidentified source 'spoke with personal knowledge.'" The court further stated that "the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly should not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'" (378 U.S. 108, 109, 113-14, 12 L.Ed. 2d 723, 725, 728-29, 84 S.Ct. 1509, 1511, 1513-14, quoting *Nathanson* and *Giordenello.*) The court held that the evidence obtained from a search conducted with the warrant was inadmissible and remanded the case for further proceedings.

The first prong, or the "basis of knowledge" part of the test announced in *Aguilar,* is concerned with the facts and circumstances showing that the informant knew that the person named has been or will be involved in criminal conduct. The most common means of satisfying this requirement is by the informant's declaration that he is revealing personal knowledge gathered through some physical sensory faculty such as

that of sight, smell or sound. (See, *e.g.*, *Stanley v. State* (1974), 19 Md. App. 507, 531, 313 A.2d 847, 861). Statements containing mere conclusions of criminal activity without a statement regarding independent facts and personal observations do not provide a sufficient basis for a neutral magistrate to decide to issue a search warrant.

Looking at the anonymous handwritten letter here one can only observe that it does not contain any statement showing that the information was acquired through firsthand or personal knowledge of the informant. The informant states that the defendants make their living by selling drugs but he does not set out the source of this knowledge or the ground for his conclusion. There is the statement that the defendants boasted of their illegal occupation, but one does not know whether they made these comments to the informant or whether this was hearsay. Similarly, the informant states that the defendants will be returning from Florida with over $100,000 in drugs and that there is over $100,000 worth of drugs in their basement. No basis of knowledge for this is given. There is no statement made that the informant ever saw drugs or was inside the defendants' residence or even that someone had told him of any of these claimed facts. The letter set out mere conclusions and contained no statements of personal observation or firsthand knowledge.

The second part of the *Aguilar* test, often, as noted, referred to as the "veracity prong," requires a showing of the underlying circumstances from which it was concluded that the informant was "'credible'" or his information "'reliable.'" (378 U.S. 108, 114-15, 12 L.Ed.2d 723, 729, 84 S.Ct. 1509, 1514.) Though it is not necessary to consider this "prong" where the "basis of knowledge" part has not been satisfied, we shall comment on it because of the State's arguments discussed later relating to self-verifying detail and corroborating evidence as support for the search warrant here.

The name of an informant need not be revealed to the magistrate before a search warrant is issued so long as it is established that the informant is credible. This requirement is usually satisifed by reciting in the affidavit previous instances in which the affiant police officer has obtained information from the informant that led to various arrests and convictions. (See *McCray v. Illinois* (1967), 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056; *People v. Garcia* (1975), 27 Ill. App. 3d 396.) Here, the informant's identity was not known to the affiant, Detective Mader. There was simply no basis on which either Mader or the magistrate could conclude that the anonymous person was credible.

The failure to satisfy under *Aguilar* that the information was credible does not of itself mean that the "veracity prong" requirements cannot be met. It may be satisfied by a showing that the informant's tip was reliable. *United States v. Harris* (1971), 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075, shows that a plurality of the court considered that the alternative requirement of reliability of the information supplied was satisfied where the informant, in giving the information, admitted activities which were against his penal interest. In *Harris* a warrant was issued to Federal and local officers permitting them to enter and search the defendant's premises where they found containers of whiskey on which the Federal tax had not been paid. The affidavit accompanying the request for a warrant stated that information was received from an individual who claimed, as a confederate, personal knowledge that the defendant was a "trafficker of nontaxpaid distilled spirits." (403 U.S. 573, 575, 29 L.Ed. 2d 723, 729, 91 S.Ct. 2075, 2077.) The court held that the informant's admission of complicity with the defendant in these activities over an extended period of time, which subjected him to possible indictment under section 5205(a) of title 26 of the United States Code (26 U.S.C. sec. 5205(a)), generated some measure of reliability. It was held that under the facts

and circumstances of the case that probable cause had been established. Assuming, *arguendo,* that we were to follow the view of the plurality in *Harris* it would have no significance, because there was no admission against penal interest here.

Concluding that the letter standing alone cannot satisfy the requirements under *Aguilar,* we consider now the State's contention that the "self-verifying detail" within the letter, coupled with the corroborating nature of the information acquired by Detective Mader, established probable cause for the issuance of the search warrant.

The notion of "self-verifying detail" is found in *Spinelli v. United States* (1969), 393 U.S. 410, 417, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 589. The court had granted *certiorari* "[b]elieving it desireable that the principles of *Aguilar* should be further explicated * * *." (393 U.S. 410, 412, 21 L.Ed. 2d 637, 641, 89 S.Ct. 584, 587.) There are important resemblances between the circumstances here and those in *Spinelli.* A search warrant had been issued, and the affidavit submitted in support of it cited a report from an unidentified informant and also one of an independent FBI investigation which was said to corroborate the informant's tip. The affidavit was more persuading than the one here. It described the informant as "a confidential, reliable informant" and stated that Spinelli was known to the affiant-special agent and to Federal and local law-enforcement officers as a gambler and bookmaker. According to the affidavit the informant had advised the FBI that Spinelli was operating a handbook and was using specified telehone numbers in its operation. The Supreme Court held that the affidavit was insufficient and that the search warrant had been issued without probable cause. The court observed: "Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact *Aguilar's* other test has not

been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information — it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. [Citation.] In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" (393 U.S. 410, 416, 21 L.Ed. 2d 637, 643-44, 89 S.Ct. 584, 589). As can be said of the investigative activities by the law-enforcement officers here, the court in *Spinelli* stated: "[W]e find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion criminal conduct when taken by themselves — and they are not endowed with an aura of suspicion by virtue of the informer's tip." (393 U.S. 410, 418, 21 L.Ed. 2d 637, 645, 89 S.Ct. 584, 590.) The court commented that the report from the informant was meager and could easily have been obtained from an offhand remark heard at a neighborhood bar.

The court in *Spinelli* did say that while an affidavit may not satisfy the "basis of knowledge" prong of the *Aguilar* test by failing to set out adequately the circumstances explaining how the confidential information was obtained, this may be

cured if the information set out is so detailed that a magistrate "could reasonably infer that the informant had gained his information in a reliable way." (393 U.S. 410, 417, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 589.) Thus an informant's report, if detailed sufficiently, may in effect verify itself in the sense that the magistrate, when presented with such detail, can reasonably infer that the informant had gained his information in a reliable way and may be a sufficient basis for a magistrate's finding of probable cause for the issuance of a search warrant. The court cited *Draper v. United States* (1959), 358 U.S. 307, L.Ed. 2d 327, 79 S.Ct. 329, a pre-*Aguilar* decision, as a "suitable benchmark" upon which to measure this sufficiency of detail. (393 U.S. 410, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 589.) It is important to observe that in *Draper* there was not, as here or in *Spinelli,* an anonymous or unidentified informant but a named informant whose information, when given to law-enforcement officers on earlier occasions, had been reliable.

The use of self-verifying detail to find probable cause is limited, though, to a situation where the informant has not otherwise disclosed the manner in which he has obtained his information and thus has failed to satisfy the "basis of knowledge" prong. While the specificity of detail may be used to supply the basis-of-knowledge requirement, it cannot establish that the informant was credible or his information reliable, in and of itself, so as to meet *Aguilar's* "veracity" prong. The court in *Stanley v. State* (1974), 19 Md. App. 507, 533, 313 A.2d 847, 862, described this when it observed: "The notion that great detail implies personal observation rather than the over-hearing of barroom gossip, presupposes an honest informant. If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes. Minute detail tells us nothing about 'veracity.'" See also *People v. Linder* (1975), 24

Ill. App. 3d 995; Note, *Probable Cause And The First-Time Informer: United States v. Harris,* 403 U.S. 573 (1971), 43 Colo. L. Rev. 357, 362 (1972).

Self-verifying detail discussed in *Spinelli* as a means of satisfying the basis-of-knowledge prong must be accepted with great circumspection. This was expressed by Mr. Justice Harlan when, as appears in the quotation above from *Spinelli,* he cautioned that the tip must describe the claimed criminal activity in detail adequate to show the magistrate that he is relying on information more substantial than casual rumor or an accusation founded only on the accused's general reputation. We cannot say that the information provided here was in sufficient detail to lead a magistrate to conclude that the tip was the product of firsthand knowledge or personal observation.

That the anonymous informant gave the name of the street where the defendants resided and stated that they would be driving from Florida in early May with drugs in the trunk of their car does not even meet the specificity of detail required by the court in *Draper v. United States* (1959), 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329, so as to cure the existing deficiency of the "basis of knowledge" prong. Nor can it be reasonably concluded that the information in the letter was acquired through first-hand knowledge rather than by rumor. Also, we reiterate and emphasize that here the informant was anonymous. In *Draper* the informant was named and identified as one who earlier had given information to law enforcement officers that had been reliable.

The corroborative evidence gathered by Detective Mader, when coupled with the "detail" of the informant's letter, did not constitute probable cause under the tests of *Aguilar.* The appellate court, in addressing this question of corroborative evidence, rejected the State's contention that corroboration

can be used to satisfy the "veracity" prong as well as the "basis of knowledge" prong of the *Aguilar* test. The court held that partial corroboration may be considered only to support the contention that the information obtained was reliable. Citing *Stanley v. State* (1974), 19 Md. App. 508, 531, 313 A.2d 847, 861-62, the court held that corroboration may not serve as a means of satisfying the "basis of knowledge" prong.

Courts are not in agreement on the question of whether partial corroboration, combined with an informant's tip, may cure a deficiency in either prong of the *Aguilar* test. See, *e.g.*, 1 LaFave, Search and Seizure sec. 3.3 (1978); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974); *Stanley v. State* (1974), 19 Md. App. 507, 313 A.2d 847.

We need not consider this question, however, since the nature of the corroborating "evidence" in this case would satisfy neither the "basis of knowledge" nor the "veracity" prong of *Aguilar*. Looking to the affidavit submitted as support for Detective Mader's request that a search warrant issue, we note that the corroborative evidence here was only of clearly innocent activity. Mader's independent investigation revealed only that Lance and Susan Gates lived on Greenway Drive; that Lance Gates booked passage on a flight to Florida; that upon arriving he entered a room registered to his wife; and that he and his wife left the hotel together by car. The corroboration of innocent activity is insufficient to support a finding of probable cause. See *Whiteley v. Warden of Wyoming State Penitentiary* (1971), 401 U.S. 560, 567, 28 L.Ed. 2d 306, 312-13, 91 S. Ct. 1031, 1036.

For the reasons given above, the judgment of the appellate court is affirmed.

Judgment affirmed.

MR. JUSTICE MORAN, dissenting:

The majority concludes that the letter combined with the facts gleaned from the police investigation does not satisfy either prong of the *Aguilar* test. I disagree. As the opinion points out, the letter did not reveal that the informant had personal knowledge of the criminal activity, the method by which the "basis of knowledge" prong is generally satisfied. However, the prong can be satisfied by sufficiently specific detail and corroborating information. (*Spinelli v. United States* (1969), 393 U.S. 410, 416-17, 21 L. Ed. 2d 637, 644, 89 S. Ct. 584, 589.) That the necessary specificity of the initial information and the requisite corroboration were present here can be demonstrated by a comparison with three United States Supreme Court cases.

Draper v. United States (1959), 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329, involved an arrest without a warrant. There, an informant gave a Federal narcotics agent information regarding narcotics law violations. On a motion to suppress, the agent testified that he "had always found the information given by [the informant] to be accurate and reliable." (358 U.S. 307, 309, 3 L.Ed.2d 327, 329, 79 S.Ct. 329, 331.) No underlying facts established this conclusion. However, the informant told the agent that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. In addition, the informant described Draper's physical appearance, the clothes he was wearing, that he would be carrying a tan zipper bag, and that he walked quickly. The court found that the agent had probable cause to arrest when a man fitting Draper's description stepped off the specified train.

In *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509, police officers, in support of their application for a search warrant, submitted an affidavit stating:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (378 U.S. 108, 109, 12 L.Ed. 2d 723, 725, 84 S.Ct. 1509, 1511.)

The court found that the information merely reflected the informant's "'suspicion,' 'belief' or 'mere conclusion.'" (378 U.S. 108, 114, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514.) In so holding, it established the two-pronged standard for evaluating if a search warrant should issue:

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation], was 'credible' or his information 'reliable.'" 378 U.S. 108, 114, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514.

With this test as the standard, the Supreme Court decided *Spinelli v. United States* (1969), 393 U.S. 410, 21 L.Ed. 637, 89 S.Ct. 584. In that case, the affidavit stated that Spinelli was known to law-enforcement agents as a bookmaker and a gambler, and that the FBI had "been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of telephones which have been

assigned and numbers WYdown 4-0029 and WYdown 4-0136." 393 U.S. 410, 414, 21 L.Ed. 2d 637, 642, 89 S.Ct. 584, 588.

The court contrasted the informant's tip with the information provided by informant in *Draper*. The court concluded that a magistrate could infer from the tip in *Draper* that the informant had gained his information in a reliable way whereas, in the case before it, the report could have been obtained from an offhand remark heard at a neighborhood bar. The court also found that the investigative police work in *Draper* corroborated much more than one small detail and resulted in the inference that the report was reliable. In contrast, the investigation in *Spinelli* corroborated only that Spinelli could have used two telephones for gambling or for some other purpose, and was insufficient to support the reliability of the information. The court stated:

> "[In *Draper*], the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established." 393 U.S. 410, 417-18, 21 L.Ed. 2d 637, 644. 89 S.Ct. 584, 590.

When comparing the affidavits in *Aguilar* and *Spinelli* and the testimony of the agent in *Draper* to the affidavit here, it is clear that this case is more similar to *Draper,* than to *Aguilar* and *Spinelli.* In *Aguilar,* the information in the affidavit consisted of mere conclusions and did not satisfy either prong of the standard established here. Similarly, in *Spinelli* the

affidavit did not contain a sufficient statement of the underlying circumstances from which the magistrate could conclude that the informer had knowledge that Spinelli was running a bookmaking operation. Further, the court found that although the affiant swore that his confidant was reliable, he offered the magistrate no reason in support of this conclusion.

In this case, however, as in *Draper,* a specific, detailed and *future* sequence of events was supplied by the informant's letter. As already stated, in *Draper* the tip was that a man fitting a particular description had gone to Chicago and would be arriving on a particular train in Denver on one of two specified mornings carrying three ounces of heroin. Here, the letter revealed that on May 3, in compliance with their usual procedure, Sue Gates would be driving down to Florida to purchase drugs. It further stated that Lance Gates would be flying down a few days later to drive their car back to Bloomingdale carrying over $100,000 in drugs in the trunk. The police investigation showed that on May 5 a person matching Lance Gates' description flew to West Palm Beach, Florida, and proceeded to the Holiday Inn West to a room registered to Susan Gates. On May 6, 7 a.m., Gates and an unidentified female left the motel driving a red-vinyl-over-gray Mercury. The investigation disclosed that Gates and the woman left the West Palm Beach area driving northbound on an interstate highway and that the driving time to Bloomingdale was 21 to 23 hours. In this case, as in *Draper,* every detail of the informant's information was corroborated by the police investigation. The specific, detailed information in the letter combined with the corroboration clearly indicates that the informant had an underlying basis of knowledge, satisfying *Aguilar's* first prong.

In addition, the specific information contained in the letter which was then corroborated proved the informant's statements to be credible and reliable, thereby satisfying *Aguilar's*

second prong. The majority opinion attempts to distinguish *Draper* by observing in that case there was a named informant who had given the agent reliable information on other occasions. However, the agent's statement as to the informant's reliability was a mere conclusion. It is questionable whether that naked assertion would satisfy *Aguilar's* second prong in that it does not present any underlying circumstances from which the judge could determine if the informant is credible or his information reliable. That statement is not essentially different from the one made in *Spinelli* that the "informant was reliable." The point is, however, that under the court's analysis in *Spinelli,* the result in *Draper,* in light of *Aguilar,* does not hinge on the mere averment that the informant had previously given reliable information. Rather, the determining factor in establishing probable cause and complying with both prongs of *Aguilar* is the specificity of the tip combined with the police verification by investigation.

Finally, the majority, citing *Whiteley v. Warden of Wyoming State Penitentiary* (1971), 401 U.S. 560, 567, 28 L.Ed. 2d 306, 312-13, 91 S.Ct. 1031, 1036, finds that the corroborating information combined with the tip would not satisfy either prong of the *Aguilar* test because the corroborating evidence was of clearly innocent activity. This conclusion is incorrect. First, in *Whiteley,* the corroborating evidence was simply that the sheriff knew the defendants and the kind of car they drove. The court in *Whiteley* specifically stated:

> "[T]he additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony." 401 U.S. 560, 567, 28 L.Ed. 2d 306, 312-13, 91 S.Ct. 1031, 1036.

In *Draper,* the corroborating information also related to innocent activity — a man fitting a particular description stepped off a train on a specific day carrying a tan zipper bag. Yet, the court in *Whiteley,* as well as in *Spinelli,* clearly held that this type of detailed information can be used to corroborate an informant's tip. The key is whether the corroborative evidence is endowed with an aura of suspicion by virtue of the informant's tip. (See *Spinelli v. United States* (1969), 393 U.S. 410, 418, 21 L.Ed. 2d 637, 645, 89 S.Ct. 584, 590.) In this case, just as in *Drpaer,* seemingly innocent activity became suspicious in light of the initial tip.

Here, the police went through the desired procedure of obtaining a warrant. The judge had before him, by way of affidavit, information from which he reasonably could conclude that the informant had knowledge that the Gates were involved in criminal activity and that the information was reliable. Under the standard enunciated in *Spinelli,* the judge could conclude he was relying on more than casual rumor or reputation and that the report had not been fabricated "out of whole cloth." (See *Spinelli v. United States* (1969), 393 U.S. 410, 416, 417, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 590.) Probable cause was determined by a neutral and detached judge. (See *Johnson v. United States* (1948), 333 U.S. 10, 14, 92 L.Ed. 436, 440, 68 S.Ct. 367, 369.) Issuance of a search warrant in the instant case is consistent with the rationale underlying *Aguilar,* as applied in *Spinelli,* and does not attenuate one's right to be free from unreasonable searches and seizures as guaranteed by the United States and Illinois constitutions.

For the above-stated reasons, I must respectfully dissent.

MR. JUSTICE UNDERWOOD joins in this dissent.

APPENDIX B

APPELLATE COURT OPINION
(Filed April 1, 1980)

NO. 78-570

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

LANCE GATES AND
SUSAN GATES,
Defendant-Appellees.

Appeal from the Circuit Court
of the 18th Judicial Circuit,

DuPage County, Illinois

Mr. JUSTICE LINDBERG delivered the opinion of the court.

The State appeals on order entered by the Circuit Court of DuPage County which quashed a search warrant and suppressed the evidence seized pursuant to the authority of the warrant. At issue is whether the warrant was sufficient under the standards set forth in *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509, and *Spinelli v. United States* (1969), 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584. We affirm.

The facts are straightforward. On May 3, 1978, the Bloomingdale Police Department received a handwritten, anonymous letter which had no return address. The letter recited as follows:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates,

they live on Greenway, off Bloomingdale Road, in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then flys [*sic*] back after she drops the car off in Florida May 3, she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000 worth of drugs in their basement.

"They brag about the fact that they never have to work, and make their entire living on pushers.

"I guarentee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Lance and Sue Gates
Greenway
in Condominiums"

On the same day the letter was received, Detective Charles Mader of the Bloomingdale Police Department made an inquiry to the Secretary of State's Office regarding the driver's license of one Lance Gates. The computer reply stated that an Illinois Drivers License had been issued to a Lance B. Gates, whose address was listed at 209 D, Dartmouth Drive, Bloomingdale, Illinois. His physical description was given as follows:

Sex — Male
Date of Birth — July 13, 1947
Height — 5'11"
Weight — 220 pounds

Hair — Brown
Eyes — Brown

Later the same day, Detective Mader contacted a confidential informant. Detective Mader had known this informant for approximately two years during which time the informant had provided the detective with information which resulted in several criminal convictions. This informant told the Detective that Lance B. Gates' current address was 198 B. Greenway Drive, Bloomingdale, Illinois.

Detective Mader then called Officer Ott of the Chicago Police Department who at that time was assigned to O'Hare Airport. Officer Ott reviewed flight information and stated that L. Gates, phone number 980-8427, was scheduled to depart Chicago-O'Hare on May 5, 1978, on Eastern Airlines Flight 245, departing at 4:15 p.m. The flight was scheduled from Chicago to Atlanta and then to West Palm Beach, Florida.

Detective Mader then told the radio operator at the Bloomingdale Police Department to call the Security Office of the Illinois Bell Telephone Company. The radio operator was told that telephone number 980-8427 was a non-published number issued to Lance B. Gates whose address is 189 B Greenway Drive, Bloomingdale, Illinois.

On May 5, 1978, Detective Mader was telephoned by Agent William Morely of the Drug Enforcement Agency. He told Mader that, pursuant to a prior arrangement with the Detective, he had maintained a surveillance on all passengers boarding Flight 245. He told Mader that a person matching the description of, and using the name Lance Gates had boarded the flight.

Agent Morely called Mader the next day and told him that an agent in Florida had just completed a surveillance on Lance Gates in West Palm Beach. This Florida agent told

Morely that he observed the defendant remain in the airport for approximately one hour after his arrival. He next saw him take a taxi which the agent followed to the Holiday Inn in West Palm Beach. The defendant went to a room which was registered to Susan Gates. At approximately 7:00 a.m. on May 6, 1978, the Florida agent saw Lance Gates and a female leave the room, go to the parking lot, and get in a red vinyl over gray Mercury bearing Illinois license plates RS8437. The Florida agent followed this Mercury northbound to an interstate which is commonly used by travelers to the Chicago area. At that point the surveillance was terminated.

Agent Morely also told Detective Mader that the license plate RS8437 was registered to the defendant but for a 1975 Hornet station wagon. Finally Agent Morely advised the Detective that the approximate driving time from West Palm Beach to Bloomingdale is 21-23 hours.

A complaint for search warrant was prepared and presented for approval to an associate judge. The complaint attached an affidavit signed by Detective Mader, which recited substantially the same facts as set forth above, and included a copy of the anonymous note as an attachment to the affidavit.[1] The request for the issuance of the warrant was approved, and a search warrant was issued authorizing police to search the person of both defendants, their condominium located on Greenway in Bloomingdale, and the gray Mercury driven by Lance Gates.

On May 7, 1978 at approximately 5:15 a.m., Lance and Susan Gates arrived at the residence of 198 B Greenway Drive, in Bloomingdale. Pursuant to the warrant, the police

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[1] The text of the affidavit is set out in full in the appendix.

searched the car and found "seven large burlap bundles of cannabis" weighing in excess of 400 pounds. The residence was then searched, and police discovered numerous rifles, a handgun, a green garbage can containing approximately twenty pounds of cannabis, three-fourths of a bale of cannabis, numerous baggies and hand-rolled cigarettes containing cannabis, and assorted weighing devices.

Both defendants were arrested and later were indicted on various narcotics and firarms' charges. Prior to trial, a motion to quash the arrest and suppress evidence was filed on behalf of both defendants. The basis of the defendants' motion was that the warrant failed to comply with the requirements of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed.723, 84 S.Ct. 1509, in that the author of the anonymous letter was not "reliable" and that there was no showing that his or her information was obtained in a reliable manner. After a hearing, the trial court granted the defendants' motion to quash and suppress, and the State appeals.

The Fourth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment, requires that search warrants be issued only upon a showing of "probable cause." Whenever a search warrant is sought on the basis of information supplied by an anonymous informant, it is necessary that the judge or magistrate issuing the warrant be provided with sufficient facts and circumstances from which he can determine the reliability of the informer and the accuracy of his present information so that the constitutional requirement or probable cause may be satisfied. *People v. Thomas* (1975), 62 Ill.2d 375, 378, 342 N.E.2d 383, 384, *People v. Isenberg* (1977), 52 Ill. App. 3d 426, 429, 367 N.E.2d 364.

The leading case of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509, set forth a two-prong test to

be applied by a judge or magistrate in testing the sufficiency of an affidavit filed in support of the insurance of a search warrant: first, the judge must be informed of some of the underlying circumstances from which the informant concluded that the defendants were involved in criminal activity (the "basis of knowledge" prong); and secondly, the judge must be informed of some of the underlying circumstances from which the affiant concluded that the informer of his information was worthy of belief (the "veracity" prong). The veracity prong of the *Aguilar* test may be, satisfied by showing either that the informant, whose identity need not be disclosed, is "credible" the ("credibility" spur) or that his information is "reliable" (the "reliability" spur). *Aguilar*, 378 U.S. at 114-115, 12 L.Ed.2d at 729, 84 S.Ct. at 1514.

Pursuant to the test set forth in *Aguilar*, the first question we must address in this case is whether the affidavit was sufficient to inform the issuing judge of the underlying circumstances from which the anonymous informant reached his conclusions that defendants were engaged in criminal conduct. The affidavit attached to the complaint for search warrant does not reveal the manner in which the anonymous informer obtained or gathered his information. (*Cf. People v. Gomes* (1980), 80 Ill. App 3d 668, 399 N.E.2d 1030 (informant had personal knowledge that crime had been committed); *People v. Swift* (1978), 61 Ill. App. 3d 486, 378 N.E.2d 234 (informer was requested by defendant to participate in crime.) Thus our inquiry turns to whether the judge could reasonably infer that the information was gained in a reliable fashion because of the great amount of detail supplied by the informer. *Spinelli v. United States* (1968), 393 U.S. 410, 417, 21 L.Ed.2d 637, 644, 89 S.Ct. 584, ____. In *Spinelli*, the Supreme Court utilized the detail provided by the informant in *Draper v. United State* (1959), 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329, as an example of the detail required to satisfy the basis of knowledge prong of the *Aguilar* test.

Using *Draper* as a standard, we are of the opinion that the information supplied by the anonymous informer does not contain sufficient detail to allow the issuing judge to reasonably infer that the informer had obtained his information in a reliable way. The anonymous letter contains no more than general allegations that defendants were involved in narcotics sales. Although the anonymous informer did state that the Gates would soon drive to Florida and return with a load of drugs in their car, no details regarding this trip were set forth in the letter. These general allegations fall far short of the specifics necessary for a judge to properly infer that the anonymous informer had gathered his information in a reliable way. Nor could the judge reasonably assume that the anonymous informer had personal knowledge on the basis of the statements set forth in the anonymous letter. In contrast to the case at bar, the informer in *Draper* supplied police with a detailed physical description of the accused, the time and date of his arrival in Denver by train, and a description of the clothes he would be wearing. The informer also stated that the accused had a habit of walking very fast. (*Draper*, 358 U.S. at 309-10, 3 L.Ed.2d at 330, 79 S.Ct. at ____.) When confronted with such detail, a judge could reasonably infer that the informer either had personal knowledge of the transaction or had obtained his information in a reliable way. The informer in the instant case set forth few details, however, and he may have obtained his information through rumor or through another unreliable method. Hence, the affidavit fails to meet the basis of knowledge requirements set forth in *Spinelli* and *Aguilar*.

The State argues that there is "substantial basis" for crediting the information supplied by the anonymous informant because the allegations set forth in the handwritten letter were fully corroborated by other independent sources. We cannot agree. Partial corroboration of an informant's story may show his information to be "reliable;" however, such corroboration only satisfies the second prong of the

Aguilar test, i.e., the veracity prong. Corroboration does not establish that the informer obtained his information in a reliable manner (1 La Fave, Law of Search and Seizure; A Treatise on the Fourth Amendment, sec. 3.3). As stated by the court in the well-reasoned case of *Stanley v. State* (1974), 19 Md.App. 508, ____, 313 A.2d 847, 861-62:

> "[T]he 'independent verification' technique cannot repair a defect in the 'basis of knowledge' prong. *Verifying the trust of part of a story does nothing to ascertain the story's source or to check the informant's perhaps invalid conclusions.* ***
>
> An informant who does not speak from personal knowledge may well be passing on an amalgam of underworld rumor and barroom gossip. If that be true, the verification of one contributing rumor would be nothing for the 'veracity' of other contributing rumors. An informant may have *** then received incriminating information from a third party lending inculpatory color to those observations. Merely verifying the informant's innocuous observations does nothing to verify the crucial third party who supplied the damning catalyst." (Emphasis ours.) (Accord, *United States v. Hamilton* (9th Cir. 1974), 490 F.2d 598, *Garner v. State* (Del. 1973), 314 A.2d 908.)

Were we to accept the State's argument, we would permit government invasion of the privacy of persons solely on the basis of anonymous tips, made perhaps out of spite or based upon unsubstantiated rumor, merely because innocent details have been verified by the observations of a police officer. Although some federal and state courts have accepted the position advanced by the State in this case (see e.g., *United States v. Tuley* (5th Cir. 1977), 546 F.2d 1264 (over dissent); *United States v. Myers* (D.C. Cir. 1976), 538 F.2d 424

(over dissent); *Horton v. State* (1977), 262 Ark. 211, 555 S.W.2d 226, *State v. Gilbert* (1976), 24 Or. App. 907, 547 P.2d 632), we believe that neither the theory nor the cases are sound and we refuse to follow them.

In view of our determination that the affidavit failed to satisfy the basis of knowledge prong of the *Aguilar* test, we need not address any other issues in this case. For the reasons stated above, the order of the Circuit Court of DuPage County is affirmed.

AFFIRMED.

SEIDENFELD, NASH, concur.

APPENDIX

Affidavit filed in support of complaint for search warrant:

"I, CHARLES J. MADER, am a detective employed by the Bloomingdale Police Department, DuPage County, Illinois. I have been so employed for the past five years. On May 3, 1978, I received a letter sent by an unknown citizen to the Bloomingdale Police Department. I received the letter and the envelope in which it was sent from Chief Patrick J. McMahon. A copy of the letter and a transmittal envelope are attached hereto and incorporated herein by reference.

"On May 3, 1978, I directed a Bloomingdale Police Department radio operator to make a SOUNDEX drivers license name inquiry with the Illinois Secretary of State, Springfield, Illinois to determine whether they had any record of a LANCE GATES residing in Bloomingdale, Illinois. The SOUNDEX response established that one LANCE B. GATES was issued an Illinois drivers license which listed his address as 209 D. Dartmouth, Bloomingdale, Illinois. A copy of the response set by the Secretary of State is attached hereto and incorporated herein by reference.

"On May 3, 1978, I contacted a confidential informant known to me for the past two year period. I have received information from this person several dozen times, resulting in seven criminal arrests with convictions in all cases. This confidential informant reviewed certain financial records available to him and told me that he located one LANCE B. GATES residing at 198 B. Greenway Drive, Bloomingdale, Illinois. He also informed

me that GATES' previous address was 209 D. Dartmouth, Bloomingdale.
CONTINUED ON PAGE 2

COMPLAINT FOR SEARCH WARRANT NUMBER S 1603 CONTINUATION OF AFFIDAVIT OF CHARLES J. MADER PAGE TWO

"On May 3, 1978, I contacted Officer Ott of the Chicago Police Department at O'Hare Airport. Officer Ott checked certain flight information available to him and told me that one L. GATES, phone number 980-8427, was registered on Eastern Airlines Flight number 245, scheduled to depart O'Hare on 4:15 P.M. on May 5, 1978. Officer Ott told me that Flight 245 travels from Chicago to Atlanta and then to West Palm Beach, Florida.

"I then directed the radio operator to contact the Security Office of Illinois Bell Telephone Company and was told by the radio operator that 980-8427 was a non-published phone number issued to LANCE GATES at 189 B. Greenway Drive, Bloomingdale, Illinois.

"On May 5, 1978, I was contacted by Agent William Morely of the Drug Enforcement Administration. He state that, pursuant to prior arrangement between us, he had maintained a surveillance on all passengers boarding Eastern Airlines Flight number 245. He stated further that an individual using the name LANCE GATES and matching the physical description furnished by Secretary of State in the attached message boarded Flight 245 bound for Florida.

"On May 6, 1978, Agent Morely contacted me and said that Drug Enforcement Administration agents in Florida had just completed a surveillance of LANCE GATES in West Palm Beach, Florida. He told me that the Federal agents in Florida observed:

1. GATES arrive in West Palm Beach, Florida via Eastern Flight Number 245 and remain in the airport for one hour before taking a taxi to the West Palm Beach Holiday Inn;

2. The room he entered was registered to one SUSAN GATES;

3. At 7:00 A.M. May 6, 1978, LANCE GATES and a female left the Holiday Inn Room registered to SUSAN GATES, and entered a red vinyl over gray Mercury bearing Illinois 1978 license RS 8437;

4. LANCE GATES and the female left the West Palm Beach area driving the Mercury northbound on that interstate highway commonly used by travelers to the Chicago area.

"Agent Morely further told me that a check of the records of the Illinois Secretary of State revealed that license RS 8437 registers to LANCE B. GATES on a 1975 Hornet station wagon.

"Agent Morely also told me that the driving time from West Palm Beach, Florida to Bloomingdale, Illinois is approximately 21-23 hours."

"/s/ DET. CHARLES J. MADER
Complainant"

"PAGE TWO OF TWO PAGES

"s/ SUBSCRIBED AND SWORN
TO BEFORE ME ON MAY 6, 1978

S. K. LEWIS
Assoc. Judge"

United States of America

State of Illinois,
Appellate Court,
Second District, } ss.

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 1st day of April, A.D. 1980.

/s/ LOREN J. STROTZ

Clerk Appellate Court, Second District.

Opposition

Office - Supreme Court, U.S.
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No. 81-430

In the

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

The Respondent would suggest that the Petitioner has misstated the "Question Presented for Review" and that the Respondent's Statement of the Question Presented is a more adequate one:

> "Whether hearsay information provided to police in an anonymous letter, containing no basis of knowledge of how the information was obtained; certain innocent details of the information being corroborated by police investigation, established sufficient probable cause to merit issuance of a search warrant."

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AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-430

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Respondents, Lance Gates and Susan Gates, respectfully pray that Petitioner's Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

OPINION BELOW

The opinion of the Illinois Supreme Court is attached to the Petition for Writ of Certiorari to the Supreme Court of Illinois as Exhibit B.

JURISDICTION

The State of jurisdiction stated by the Petitioner is adequate.

STATEMENT OF THE CASE

The Petitioner's statement of the case is adequate and acceptable to the Respondent.

REASONS FOR DENYING THE WRIT

THE HEARSAY INFORMATION PROVIDED IN A LETTER BY AN ANONYMOUS WRITER WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT ISSUED IN THIS CASE. THE CASE DOES NOT PRESENT A QUESTION MERITING REVIEW BY THIS COURT.

ARGUMENT

The Petitioner would have the Court grant certiorari in the instant case because as stated in the Reasons for granting the writ: "THE ENFORCEMENT OF DRUG LAWS IN ILLINOIS WILL BE THWARTED IF OFFICERS ARE NOT PERMITTED TO RELY UPON DETAILED INFORMATION SUPPLIED BY AN ANONYMOUS CIVILIAN INFORMER". The Respondent would suggest that the facts of this case demonstrate that only *improper* and illegal enforcement has been thwarted in this case, not proper and legal enforcement.

This Court in *Aguilar* v. *Texas,* 378 U.S. 108, 12 L.Ed 2d 723, 84 S.Ct. 1509 (1964); and *Spinelli* v. *United States,* 393 U.S. 410, 21 L.Ed 2d 637, 89 S.Ct. 584 (1969) established basic standards whereby law enforcement officers and the members of the judiciary could evaluate the sufficiency of probable cause based on the hearsay of an anonymous informer to support a search warrant. The Court in *Aguilar* (378 U.S. 108, 114-15, 12 L.Ed 2d 723, 729, 84 S.Ct. 1509, 1514) established the "two-pronged" test, the two prongs of which are commonly called the "basis of knowledge" prong and the "veracity prong".

The Circuit Court of DuPage County, the Illinois Appellate Court and Supreme Court of Illinois each reviewed the probable cause supportive of the search warrant utilizing the *Aguilar* and *Spinelli* standards of evaluation and found it wanting. The final and correct result of each court's review of the search warrant and its supportive affidavits was as follows:

(1) The letter from the anonymous author is absent any description of the manner or means by which that person obtained the information offered in that letter;

(2) The corroboration of entirely innocent detail by investigating police officers was insufficient by the "self verifying detail" concept of *Spinelli* v. *United States*, 393 U.S. 410, 417, 21 L.Ed 2d 637, 644, 89 S.Ct. 584, 589 (1969) to cure the inadequate "basis of knowledge" information in the letter. (Pages 8a-11a of the Illinois Supreme Court opinion);

(3) The reliance of the State of Illinois on *Draper* v. *U.S.*, 358 U.S. 307, 3 L.Ed 2d 327, 79 S.Ct. 329 (1959) is misplaced and the fact that a previously reliable informant supplied a specificity of detail far in excess of that supplied in the instant case was utilized by the Supreme Court of Illinois at pages 10a-11a to distinguish *Draper* from the instant case.

The above findings set forth the legal reasons why certiorari should not be granted. An anonymous letter does not differ from an anonymous phone call or any other form of hearsay generated probable cause based on the tip of an unnamed informer. Each of the above must be judged by the criteria established by this court and if those defined parameters are not met, as in the instant case, the search warrant is constitutionally infirm.

The Defendant-Respondent would further suggest to this court that the question presented here does not warrant review by this court. The *Aguilar* precedent is long established and the present case offers only factual interpretation of that precedent and presents no novel constitutional question of sufficient breadth of import to merit granting by this Court of the State of Illinois Petition for Certiorari.

CONCLUSION

The Supreme Court of Illinois, the Illinois Appellate Court, and the Circuit Court of DuPage County correctly applied the probable cause standards established by this Court and this cause presents no constitutional question of sufficient import to merit review by this court.

The Petition for Certiorari advanced in this case should be denied.

Respectfully submitted,

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Supplemental Brief

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No. 81-430

In the

Supreme Court of the United States

THE STATE OF ILLINOIS,

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LANCE GATES and SUSAN GATES,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

RESPONDENTS ANSWER TO MOTION FOR LEAVE TO AMEND OR ENLARGE QUESTION PRESENTED FOR REVIEW

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In The

SUPREME COURT OF THE UNITED STATES

No. 81-430

THE STATE OF ILLINOIS,

Petitioner,

vs.

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Respondent.

On Writ Of Certiorari To
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RESPONDENTS ANSWER TO MOTION FOR LEAVE TO AMEND OR ENLARGE QUESTION PRESENTED FOR REVIEW

I.

The respondents, Lance and Susan Gates, by their attorney, James W. Reilley, *opposes* the petitioner(s) request to enlarge or amend the question presented in this case.

II.

JURISDICTION

Within the plethora of rules and Supreme Court authorities relied upon by the petitioner, one has no doubt that this Court may, within its own discretion,

grant leave to amend or enlarge the question(s) presented as per the petitioners certiorari petition. We do not urge to the contrary. Our opposition relates, rather, to the subject matter of the proposed amendment or enlargement.

III.

THE PROPOSED AMENDMENT

The State of Illinois, in their petition for writ of certiorari, presents this question for review:

> "WHETHER DETAILED INFORMATION PROVIDED TO POLICE BY AN ANONYMOUS INFORMER, COUPLED WITH GOVERNMENT CORROBORATION OF THE INFORMATION, PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT?"

The petitioner, now proposes to enlarge or amend the question to:

> "ASSUMING, ARGUENDO, THAT THE INFORMATION USED TO OBTAIN THE SEARCH WARRANT DID NOT SATISFY *AGUILAR V. TEXAS*, 378 U.S. 108 (1964), SHOULD THE EVIDENCE OBTAINED UNDER THE WARRANT NEVERTHELESS BE ADMITTED AT TRIAL BECAUSE THE POLICE ACTED IN A REASONABLE GOOD FAITH BELIEF IN THE VALIDITY OF THE WARRANT?"

IV.

ARGUMENT IN OPPOSITION TO THE PROPOSED AMENDMENT

The petitioner would suggest that the warrantless arrest and search "good faith" exception to the exclusionary rule . . . has a place in this case. The petitioner is mistaken.

Recent warrantless arrest-search cases from this Court overwhelmingly pronounce the continued difference as between a warrantless arrest/search . . . and one conducted with the benefit of a judicially approved warrant. The Court has consistently found that the warrantless search of premises is "per se" unreasonable[1] and the warrantless entry onto private premises may likewise suffer the vice of Fourth Amendment prohibitions, notwithstanding whatever "good faith" may be involved insofar as the agents or police officers entering the said premises[2]. As regarding non-dwelling or non-premises situations, the Court has ruled in any number of recent cases that the particular facts of the particular case will dictate whether the arrest/search will survive Fourth Amendment scrutiny (assuming a warrantless situation)[3].

The case at bar presents a fact situation which cannot conceivably incorporate the proposed amendment. Here, the facts reveal that on May 7, 1978 in Bloomingdale, Illinois, the respondents, were getting out of a car, in front of their home when certain police officers served both of them with a search warrant. The search warrant called for the search of their car and the dwelling. A search of the car and the dwelling (in the apparent

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[1] *e.g., See* v. *Seattle,* 387 U.S. 541 (1967); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *Michigan* v. *Tyler,* 436 U.S. 499 (1978); *Mincey* v. *Arizona,* 437 U.S. 385 (1978).

[2] *e.g., Dunaway* v. *New York,* 442 U.S. 200 (1979); *Payton* v. *New York,* 445 U.S. 573 (1980); *Steagald* v. *U.S.,* ..... U.S. ....., 101 S. Ct. 1642 (1981).

[3] *e.g., Deleware* v. *Prouse,* 440 U.S. 648 (1979); *Brown* v. *Texas,* 443 U.S. 47 (1979); *U.S.* v. *Cortez,* ..... U.S. ....., 101 S. Ct. 1690 (1981).

presence of the respondents)[4] revealed the items which were (are) the subject matter of the original charges[5].

The petitioner, suggests that this case is "particularly appropriate" (pg. 4 of the motion) for consideration of the application of the "good faith exception to the exclusionary rule" (pg. 4 of the motion). The petitioner makes this conclusion based on the efforts of the police in this case in getting a search warrant for the home and automobile. The petitioner suggests that because:

(A). This Court granted certiorari in *Taylor* v. *Alabama*, ... U.S. ....., 102 S. Ct. 502 (1981) and,

(B). The present case was heard in the Illinois Courts before any SIGNIFICANT, PUBLISHED OPINION as regarding the "good faith exception to the exclusionary rule". . . .

Therefore, this Court should now amend or enlarge the original certiorari issue.

The *Taylor* v. *Alabama* case relates to a warrantless arrest and thereafter a confession. The question then becomes whether or not Alabama declined to follow this

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[4] The record does not reveal any question as to whether the respondents were free to leave, see *Michigan* v. *Summers*, ... U.S. ....., 101 S. Ct. 2587 (1981). The respondents have not raised the question in any event.

[5] The petitioner, in their motion to enlarge, at pg. 4, reviews the items seized during the May 7, 1978 search. We assume the petitioner, by reviewing the items seized, is not intimating that those items call for any special considerations by the court. It has oft been stated that a search cannot be justified based upon what is seized during the search.

Court's decisions in *Brown* v. *Illinois,* 422 U.S. 590 (1975) and decisions following *Brown.*[6]

The petitioner suggests that the recent decision in *U.S.* v. *Williams,* 622 F.2d 830 (*en banc,* CA 5, 1980) merits consideration in connection with their motion. The *Williams* case was decided on July 31, 1980 yet the petitioner NEVER raised the same issue before the Illinois Supreme Court, *albeit* their petition for leave to appeal from the Appellate to the Illinois Supreme Court . . . and the People's brief filed in support of their petition for leave to appeal to the Illinois Supreme Court . . . were after the Court of Appeals for the Fifth Circuit decided the *Williams* case (July 31, 1980). The case at bar was decided by the Illinois Supreme Court in June, 1981 (*People* v. *Gates,* 85 Ill.2d 376, 423 N.E. 2d 887, June 26, 1981) (Justices Moran and Underwood, dissenting). In *Steagald* v. *U.S.,* ..... U.S. ....., 101 S. Ct. 1642 (1981) the Court found that it was impermissible, absent consent or exigent circumstances, to search a home for the subject of an arrest warrant, absent a search warrant. In *Steagald* the government attempted to induce the court to review a "standing" question [for the search of the home] although the government had not previously presented that issue [standing] to either the trial or appellate courts. The Court, declined the government's invitation to review "standing" . . . in a situation where the government could have raised the question below. A fair reading of *Steagald* strongly intimates that this

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[6] *e.g., Brewer* v. *Williams,* 430 U.S. 387 (1977); *Edwards* v. *Arizona,* ..... U.S. ....., 101 S. Ct. 1880 (1981).
There is simply no relationship as between *Taylor* v. *Alabama, ante,* and the instant case.

Court will not allow the petitioner to raise, for the first time, a question that could have been previously raised, and which the petitioner could have reasonably anticipated . . . should have been raised (*Steagald,* ..... U.S. ....., 101 S. Ct. at 1646, n.5).

It is relatively clear that as between June of 1980 and June of 1981, (when *Gates* was actually decided by the Illinois Supreme Court) the petitioner had ample opportunity to offer the new concept that they claim arose for the first time out of the *Williams* decision.

Even further, we suggest that the petitioner is wrong in suggesting that the "good faith" exception had not earlier been the subject of any published opinion. As we read the dissent by Mr. Justice Rehnquist in *Ybarra* v. *Illinois,* ..... U.S. ....., 100 S. Ct. at 346-352 it is rather clear that Mr. Justice Rehnquist (with whom the CHIEF JUSTICE AND MR. JUSTICE BLACKMUN JOINED IN THAT DISSENT) reviewed the content of a good faith exception substituting "reasonableness" for the words "good faith" (*c.f., Ybarra* v. *Illinois,* ..... U.S. ....., 100 S. Ct. at 349-350).

V.

CONCLUSION

In *Steagald* v. *U.S.*, ... U.S. ....., 101 S. Ct. 1642 (1981), the Court declined to allow the government to do, what the petitioner in the case at bar is suggesting, as appropriate. To enlarge the question to a "non-warrant" good faith situation would be to give an extreme tactical advantage to the petitioner. The petitioner argued in the Circuit Court of DuPage County that the search warrant was adequate. This argument was made by the petitioner in 1978. No other or further argument was raised by the petitioner in that court. After the warrant was quashed in the Circuit Court, the petitioner appealed to the Illinois Appellate Court, Second District The petitioner argued, once again, only that the warrant was valid. The Illinois Appellate Court affirmed (82 Ill. App. 3d 749, 403 N.E. 2d 77, April 1, 1980). On further review, the petitioner in the Illinois Supreme Court offered no argument other than the validity of the search warrant, (85 Ill. 2d 376, 423 N.E. 2d 887, June 26, 1981). To now allow the petitioner to attempt to engrave a separate question . . . and one that could conceivably have a significant impact on this Court's decision in this case . . . would, under all the circumstances, provide not only a tremendous tactical advantage to the petitioner, but would in actuality be a disservice to the Court.

The petitioner's position is that the search warrant is good. This has been their consistent position (*albeit* rejected by every Illinois Court to which the question was presented). To now attempt to alter the question presented . . . is, in reality, nothing more than an attempt

to abandon the original question (*e.g.*, the validity *vel non* of the search warrant).

The respondents urge that the petitioner's motion be denied.[1]

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[1] In *U.S.* v. *Minis*, 666 F.2d 134 (CA 5, 1982), the Court vacated and remanded a suppression order from the district court involving an affidavit for a search warrant. The government asked the Court of Appeals to consider THE GOOD-FAITH EXCEPTION AS PER *JOHNSON* (666 F.2d at 135. The Court, while vacating or remanding, stated as regarding THE GOOD-FAITH EXCEPTION . . . "the government DID NOT RAISE the argument before the district court" . . . and therefore, the Court of Appeals refused to consider the government's argument (666 F.2d at 140).

The petition at bar presents an identical "waiver of argument" situation.

Petitioner's Brief

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No. 81-430

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,
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LANCE GATES AND SUSAN GATES,
Respondents.

On Writ of Certiorari To
The Supreme Court of Illinois

PETITIONER'S OPENING BRIEF ON MERITS

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QUESTION PRESENTED FOR REVIEW

Whether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?

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No. 81-430

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,
Petitioner,

vs.

LANCE GATES AND SUSAN GATES,
Respondents.

PETITIONER'S OPENING BRIEF ON MERITS

OPINION BELOW

The decision of the Illinois Supreme Court in this case is reported as *People v. Gates*, 85 Ill.2d 376, 423 N.E.2d 887 (1981). The decision of the Illinois Appellate Court is reported as *People v. Gates*, 82 Ill.App.3d 749, 403 N.E.2d 77 (2d Dist. 1980). The decision of the Circuit Court of DuPage County, Illinois has not been reported.

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court affirming the order of the Appellate Court was rendered on June 26, 1981. The petition for certiorari was filed within sixty days of that opinion. This Court granted certiorari on January 11, 1982. The jurisdiction of the Supreme Court of the United States to hear this case is based upon 28 U.S.C. §1257(3) since in the

proceedings in the state courts of Illinois the Respondents have specifically set up, and throughout asserted, an alleged violation of their rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution amendment IV.;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution amendment XIV.;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 3, 1978, the Bloomingdale police department received by mail an anonymous handwritten letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

"This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back. Sue flys [sic] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.

They brag about the fact they never have to work, and make their entire living on pushers.

I guarantee [sic] if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Sue Gates
Greenway
in Condominiums."

The chief of police delivered the letter to Charles Mader, a detective of the Bloomingdale police department and he requested one of the department's radio operators to seek assistance from the Secretary of State's office in Springfield in obtaining a specific address for the Gates. That office advised that an Illinois driver's license had been issued to a Lance Gates residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had provided reliable information to Mader during the previous two years. Upon examining certain financial records to which the informant had access, he reported a new

address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the Secretary of State's office.

Upon inquiry, Mader was told by an officer of the Chicago police department assigned to O'Hare Airport that "L. Gates" had made a reservation with Eastern Airlines on its flight 245, which was to depart from O'Hare on May 5, at 4:15 p.m. The final destination of the flight was West Palm Beach, Florida.

On May 5, Mader was told by William Morely, an agent of the Drug Enforcement Administration, that "Lance Gates" had boarded Eastern Airlines flight 245 bound for Florida. The following day Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told him that he observed Gates and an unidentified woman leave the room at 7 a.m. and enter a red vinyl over gray Mercury with 1978 Illinois license number RS 8437. Records at the Secretary of State's office showed that the license plate was registered for Lance B. Gates, but had been issued for a different automobile.

Gates then left the West Palm Beach area driving northbound on the interstate highway commonly used by travelers to the Chicago area. The approximate driving time from West Palm Beach, Florida to Bloomingdale, Illinois is 21 to 23 hours.

Based on the anonymous letter, the described information obtained from the law enforcement authorities, and the verification of the address obtained from the confidential informant, Mader, on May 6, sought and obtained in the Circuit Court of DuPage County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving in Florida.

At 5:15 a.m. on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by waiting Bloomingdale police officers. In the trunk of the Mercury the officers found several large bundles of marijuana weighing a total of approximately 350 pounds. A search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. Police also ascertained that the couple had cocaine in their possession. They were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm.

The defendants filed a pretrial motion to quash the search warrant and to suppress all physical evidence obtained as a result of the search. They argued that the magistrate should not have relied upon the anonymous letter in making his determination of probable cause because the letter did not pass muster under the two pronged test for probable cause described in *Aguilar v. Texas*, 378 U.S. 108 (1964).

The Circuit Court of Dupage County granted defendants' motions to quash the warrant and to suppress the evidence seized pursuant to it. The People of the State of Illinois appealed the suppression order. On April 1, 1980, the Appellate Court for the Second Judicial District of Illinois affirmed the Circuit Court. On June 26, 1981 the Illinois Supreme Court affirmed the decision of the Appellate Court.

The Illinois Supreme Court agreed with the defendants that the magistrate should have ignored the anonymous letter because it failed to satisfy either prong of the two prong test for probable cause described in *Aguilar v. Texas*, 378 U.S. 108 (1964). The Court held that the letter failed to satisfy the "basis of knowledge" prong because the letter did not say

that its author acquired his information through personal observation. The letter was not so detailed, the Court further held, that personal observation could be inferred. The Court also held that the letter failed to satisfy the "veracity" prong because the magistrate did not know whether the author of the letter was a truthful person and because the letter contained no admission against the penal interest of its author. Either defect, the Illinois Supreme Court held, was fatal. The Illinois Supreme Court went on to hold that independent police investigation failed to remedy either defect because it disclosed only innocent activities on the part of the defendants. On January 11, 1982 this Court granted the State's petition for certiorari.

SUMMARY OF ARGUMENT

The decision of the Illinois Supreme Court was incorrect. Probable cause to justify issuance of a search warrant exists when the facts and circumstances presented to the magistrate are sufficient to warrant a prudent person in the belief that the described items are in the indicated location. The evidence presented to the magistrate was more than ample under this standard. The detailed nature of the tip, the extent of police corroboration, the absence of an apparent motive to lie on the part of the hearsay informant and the nature of the defendants' trip to Florida, taken together, justified the conclusion that narcotics were probably present in the defendants' house and car. This Court has approved determinations of probable cause based on much less evidence. See e.g., *Adams v. Williams*, 407 U.S. 143 (1972).

The Illinois Supreme Court's reliance upon *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) for a contrary result was misplaced. The two

decisions are distinguishable and the anonymous letter in this case satisfied the two prong test for probable cause described in those decisions. The veracity prong was satisfied by the absence of an apparent motive to lie on the part of the hearsay informant and police corroboration of the informant's tip. The basis of knowledge prong was satisfied by the nature and extent of the detail in the informant's tip and by the police corroboration.

In any event to the extent that the *Aguilar* two prong analysis is inconsistent with the analysis employed by this Court in *Adams v. Williams*, 407 U.S. 143 (1972), *Chambers v. Maroney*, 399 U.S.42 (1970), *Jaben v. United States*, 381 U.S. 214 (1965), *Jones v. United States*, 362 U.S. 257 (1960), *Draper v. United States*, 358 U.S. 307 (1959) and *Brinegar v. United States*, 338 U.S. 160 (1949), *Aguilar* should be overruled.

FACTS AND CIRCUMSTANCES PRESENTED TO MAGISTRATE WERE SUFFICIENT TO JUSTIFY ISSUANCE OF WARRANT

The decision of the Illinois Supreme Court was incorrect. The magistrate's determination of probable cause was proper and should not have been overturned.

"This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). The standard for probable cause to justify the issuance of a search warrant is basically the same, except the focus of inquiry is not whether

an offense has been committed but whether the items sought are "probably present" in the described location. See *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257, 271 (1960).

The search warrant in this case was properly issued under that standard. The facts and circumstances presented to the magistrate were sufficient to warrant a prudent person in the belief that illegal narcotics were probably present in the defendants' house and car.

To begin with the anonymous letter. The letter describes the defendants activities in detail and sets forth facts and circumstances supporting its conclusion that police will find illegal narcotics in the defendants' house and car. The letter identifies the defendants by name, tells where they live and notes that the defendants "brag about the fact they never have to work, and make their entire living on pushers." The letter observes that the defendants "are friends with some big drugs dealers, who visit their house often." The letter explains where the defendants buy their drugs and how they pick the drugs up. "Most of their buys are done in Florida where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back." The letter then goes on to describe the defendant's immediate travel plans. "May 3 she is driving down there again and Lance will be flying down in a few days to drive it back." The letter then notes "At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement."

The circumstances set forth in the letter are plainly incriminating, if true, and the nature and extent of its detail provide strong evidence that the letter is based upon its author's personal knowledge rather than upon surmise or rumour.

It is also noteworthy that the letter came to police from an ordinary citizen who volunteered his information rather than

from a paid police informer who was paid for his information. People who sell information to police have a financial incentive to fabricate false accusations in order to have something to sell. This is not true for citizen informers who volunteer their information and the informant in this case had no apparent reason to lie.

Turning now to the police corroboration of the informant's tip. Police were able to verify several details in the anonymous letter. This greatly reduced the possibility that the informant was reporting a made-up story or the product of someone's speculation. Police verified that the defendants lived where the informant said they did. Police confirmed that Lance Gates flew to Florida on May 5, 1978, as predicted by the informant. Police verified that upon arriving in Florida, he went to a motel room registered to his wife, again consistent with the prediction of the informant. The next morning police ascertained that Gates left the motel and got into his own car which had already been driven to Florida, again consistent with the informant's prediction. Finally, police verified that Gates left the West Palm Beach area and drove north on an interstate highway commonly used by travellers to the Chicago area, once again consistent with the prediction of the informant.

Police investigators not only corroborated the informant's tip. They also uncovered a number of circumstances that lent credence to the tip and greatly diminished the possibility that the defendants were ordinary vacationers and the anonymous letter merely a malicious prank by a friend or neighbor who knew only that the defendants would be vacationing in Florida in early May. The defendants' trip to Florida had all the earmarks of a drug run and none of the earmarks of an ordinary vacation. The typical vacationing family would travel to Florida together, stay for a while and then return by the same mode by which they came. The average vacationer would not, as Lance Gates did, fly from Chicago to West

Palm Beach, Florida, arrive in the evening, go directly from the airport to a motel, check into a room registered to his wife, leave the motel at 7:00 a.m. the next morning, get into his own car, somehow waiting for him in Florida, and drive directly back toward Illinois. This unusual itinerary suggests a number of things. First, Lance Gates' short stay in West Palm Beach, Florida suggests that he was anxious to minimize the time that his home in Illinois would be left unattended. This, in turn, is consistent with the informant's statement that there were over $100,000.00 worth of drugs in the basement of the Gates' home in Illinois. A person with valuables of that sort might well be inordinately fearful of burglars. Second, the short stay suggests that Gates' trip to Florida had a business purpose rather than a recreational purpose. Since Lance Gates went only to his motel room and his car before leaving, the natural inference is that Lance Gates went to Florida to pick something up and drive it back to Illinois. That Gates drove back to Illinois, rather than flew, despite his evident concern for haste, suggests that he was transporting something that he did not want to ship or send through airport security; something over which he wished to maintain constant and exclusive control. Given that Florida is the major port of entry for illegal narcotics brought into the United States[1], a fact this Court may judicially notice, see *Carroll v. United States*, 267 U.S. 132, 159 (1925), the natural inference is that Gates was bringing narcotics of some sort back to Illinois, just as the anonymous letter predicted.

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[1] A publication of the Drug Enforcement Administration, The National Narcotics Intelligence Consumers Committee, Narcotics Intelligence Estimate, The Supply of Drugs to the U.S. Illicit Market From Foreign and Domestic Sources in 1979 reports at page 10:

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All of these circumstances, the detail of the letter, the absence of an apparent motive to lie, the police corroboration and the nature of Lance Gates' short trip to West Palm Beach, taken together, are more than ample to justify the magistrate's determination of probable cause, particularly when considered in light of "the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

THIS COURT HAS APPROVED FINDINGS OF PROBABLE CAUSE ON LESS EVIDENCE THAN WAS PRESENT HERE

This Court has approved findings of probable cause on less evidence than was present here. In *Adams v. Williams*, 407 U.S. 143 (1972) an unnamed informer told a police officer that a person sitting in a parked car was carrying a gun in his waistband and was also carrying illegal narcotics. The officer approached the suspect, reached into the car, and found the gun in the place indicated. The officer then arrested the suspect, searched him and found the illegal narcotics.

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> Reflecting the heavy south-to-north flow of cocaine and marihuana from South America, Florida remained the prime smuggling gateway to the illicit U.S. drug market. Approximately 40 percent of all cocaine and 30 percent of all imported marihuana moved through the State, representing an estimated retail value of approximately $25 billion. Most of the counterfeit Quaalude shipments smuggled by air and sea were also destined for the Florida area.

The defendant challenged the search. The informant had never given police reliable information in the past and, in any event, there was no indication how the informant acquired his information. The discovery of the gun, the defendant argued, could not remedy either defect since possession of the gun was consistent with innocent behavior. Under local law possession of a gun, even if concealed, was lawful so long as the owner had a license and the police officer never asked whether the defendant had a license before making the arrest and searching the defendant for narcotics. Therefore, the defendant argued, the officer lacked probable cause.

This Court rejected that argument and approved the officer's determination of probable cause. Probable cause existed, this Court held, because "the policeman found Williams in possession of a gun in precisely the place predicted by the informant. This tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the gun." *Id.* at 148-149.

Similarly here, police verified Lance Gates' strange trip to Florida to pick up his own car and immediately drive it back toward Illinois precisely as predicted by the informant. To paraphrase *Adams*, this tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for the journey.

Indeed, there is more reason to approve the finding of probable cause in the instant case than there was in *Adams v. Williams*. The informant's tip was more detailed here, the corroboration was more extensive and the determination of probable cause was made by a neutral and detached magistrate rather than by "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

There are other favorable precedents. In *Draper v. United States*, 358 U.S. 307 (1959) federal agents arrested a suspect and searched him for narcotics on the basis of a tip from a reliable informant that the defendant would be carrying narcotics as he left a particular train together with government corroboration that a man meeting the informant's description exited the indicated train. This Court approved the arrest and search as based upon probable cause even though there was no indication how the informant acquired his information. This Court reasoned that Marsh, the arresting officer

> "...had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had 'reasonable grounds' to believe that the remaining unverified bit of Herreford's information — that Draper would have the heroin with him — was likewise true." *Id.* at 313.

Similarly here, once police verified the informant's identification of the defendants and detailed prediction of their unusual travel plans, there were reasonable grounds to believe that the remaining unverified bit of information that the defendants would be transporting narcotics — was likewise true.

Indeed the case for probable cause may be stronger here than it was in *Draper* since the surrounding circumstances here were less innocent than were those in *Draper*. Draper just took a train from Denver to Chicago then returned, a few days later, from Chicago to Denver, also by train. Standing alone these circumstances do not corroborate the informant's report. Lance Gates, by contrast, flew from Chicago to Florida to meet his own car, evidently driven there ahead of

him by his wife, then the very next morning drove back toward Illinois. These travel plans are highly probative on the question of probable cause in and of themselves.

In *Carroll v. United States*, 267 U.S. 132 (1925) the Court approved the search of a car based upon only three circumstances: (1) the defendants had offered to sell a federal agent bootleg liquor in Grand Rapids, Michigan but failed to deliver; (2) a few weeks later federal agents saw the defendants driving from Grand Rapids toward Detroit; and, (3) two months after that federal agents saw the defendants driving toward Grand Rapids from the direction of Detroit. This Court took judicial notice "that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit river, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior." *Id.* at 160. This Court then reasoned that the federal agents had convincing evidence that "the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids, — i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city." *Id.* at 160.

This Court went on:

> "The officers had soon noted their going from Grand Rapids halfway to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward, presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of

> supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt; and we think it is equally clear that they had reasonable cause for thinking so. *Id.* at 160.

Similarly, in *Brinegar v. United States*, 338 U.S. 160 (1949) this Court approved the stop of a car just inside the Oklahoma border from Joplin, Missouri because Oklahoma was a "dry" state at the time, because the driver of the car was a known bootlegger and because the driver had been seen loading liquor into his car on several occasions in the six months prior to the search. This Court reasoned, "[I]t is impossible to distinguish the Carroll Case with reference to the proof relating to the source of supply, the place of probable destination and illegal market, and consequently the probability that the known liquor operators were using the connecting highway for the purposes of their unlawful business." *Id.* at 167.

Petitioner submits that the circumstances of Lance Gates' journey to and from Florida, the most active center for introducing illicit narcotics into this country, gave far more basis for a belief that contraband was being transported than did the Carroll brothers' drive from Detroit to Grand Rapids or Brinegar's drive from Joplin, Missouri into Oklahoma. There were many innocent reasons why the Carroll brothers might be driving toward Grand Rapids or Brinegar from Joplin, Missouri into Oklahoma. It is much harder to explain away Lance Gates' flight to Florida to meet his own car which he immediately drove back toward Illinois.

Accordingly, petitioner submits that the facts and circumstances presented to the magistrate in the instant case were ample under this Court's decisions to justify his finding of probable cause.

THE ILLINOIS SUPREME COURT'S RELIANCE UPON AGUILAR AND SPINELLI WAS MISPLACED

The Illinois Supreme Court's reliance upon *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) to reach an opposite result and to overturn the search warrant was misplaced. Those decisions are distinguishable on their facts and the search warrant affidavit in the instant case passed muster under the two prong analysis described in these decisions.

In *Aguilar v. Texas*, 378 U.S. 108 (1964) police officers submitted a search warrant affidavit which stated:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Id.* at 109.

The Court held the affidavit deficient because the information merely reflected the informant's "'suspicion', 'belief' or 'mere conclusion.'" *Id.* at 114. The Court concluded by setting forth a two pronged standard of review for determinations of probable cause based in part upon hearsay evidence.

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, [citation], was 'credible' or his information 'reliable.'" *Id.* at 114, 115.

In *Spinelli v. United States*, 393 U.S. 410 (1969) the search warrant affidavit stated that Spinelli was known to law-enforcement agents as a bookmaker and a gambler, and that the FBI had "been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." *Id.* at 414. Police corroborated only that Spinelli frequented an apartment building to which these telephone numbers were assigned. This Court held the affidavit inadequate under the *Aguilar* standard.

The search warrant affidavit in the instant case was far more detailed than those condemned in *Aguilar* and *Spinelli*, the police corroboration is more extensive and the surrounding circumstances more reliable indicia of probable cause. The tip does not merely state a conclusion. It sets forth the facts and circumstances supporting the conclusion. The facts of the instant case are far closer to those of *Draper* which *Spinelli* cites with approval than to those of either *Aguilar* or *Spinelli*. See *Spinelli v. United States*, 393 U.S. 410, 417-418 (1969).

AGUILAR VERACITY PRONG WAS SATISFIED HERE BECAUSE POLICE CORROBORATED THE INFORMANT'S TIP AND BECAUSE CITIZEN INFORMANT HAD NO APPARENT REASON TO LIE

The search warrant affidavit also passes muster under the *Aguilar* two prong analysis. Turning first to the veracity prong. This prong requires evidence that the informant is a credible person or his information reliable. The Illinois Supreme Court erred when it held that the veracity prong can be satisfied only by evidence that the informant had

given reliable information in the past, or that he made an admission against his penal interest or that police uncovered corroborating circumstances that are incapable of innocent explanation even when viewed in isolation. These are not the only ways the veracity prong can be satisfied. Veracity may also be inferred from either of two other circumstances that are present in this case: (1) the absence of an apparent motive to lie on the part of the hearsay informant; or (2) police corroboration of some activity which is consistent with the tip although it would appear harmless without it.

CITIZEN INFORMANT IS PRESUMED RELIABLE

This is clear from this Court's cases following *Aguilar*. In *Jaben v. United States*, 381 U.S. 214 (1965), a tax prosecution, the criminal complaint recited that the affiant had investigated the taxpayer's financial records and interviewed "third persons having knowledge of the said taxpayer's financial condition" *Id.* at 221-222, and, as a result, believed that the taxpayer had understood his income and tax owing by certain specified amounts. Even though there was no direct evidence that the third persons having knowledge of the defendant's financial conditions were credible persons or that their information was reliable this Court approved the complaint as sufficient for a finding of probable cause. This Court reasoned that the hearsay informants had no reason to lie and were not likely to lie. Their veracity could therefore be presumed.

In *Chambers v. Maroney*, 399 U.S. 42 (1970) police stopped and searched a car that matched the description of a car eye witnesses saw driving away from an armed robbery. Under the Illinois Supreme Court's interpretation of *Aguilar* the search would have been improper since there was no

evidence that the eye witnesses had ever given police reliable information in the past, the witnesses made no admission against their penal interest and the presence of the car on the highway was, in and of itself, clearly innocent. Yet this Court had no trouble approving the search, holding that police had ample cause to stop and search the car that matched the description given to them by the citizen-informers.

Jaben and *Chambers* were correctly decided. Citizen-informers, that is, persons who are not paid or protected police informers, should be presumed credible absent an apparent motive to lie. Citizen-informers do not have the financial incentive to fabricate false accusations that paid informers do. Moreover, if citizen-informers were not presumed credible then criminals could victimize people who have not informed in the past, confident that the victim's complaint to police would be insufficient to justify an arrest. Plainly, this would be unacceptable. As this Court put it in *Adams v. Williams*, 407 U.S. 143, 147 (1972), "when the victim of a street crime seeks immediate police aid and gives a description of his assailant...the subtleties of the hearsay rule should not thwart an appropriate police response." See also *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975); *United States v. Unger*, 469 F.2d 1283 (7th Cir. 1972); *McCreary v. Sigler*, 406 F.2d 1264, 1269 (8th Cir. 1969); *United States v. Mahler*, 442 F.2d 1172, 1174-75 (9th Cir. 1971); *United States v. Bell*, 457 F.2d 1231, 1238-39 (5th Cir. 1972); *Brown v. United States*, 365 F.2d 976 (D.C. Cir. 1966).

The informer in this case was a citizen informer rather than a paid police informant. The informer volunteered his information. He received no reward. He had no apparent financial reason to lie. In this respect, the informer in this case resembles the unnamed "third persons having knowledge of the said taxpayer's financial condition" whose infor-

mation was credited in *Jaben v. United States*, 381 U.S. 214, 221-222 (1965) or the eye witnesses whose information was credited in *Chambers v. Maroney*, 399 U.S. 42 (1970).

POLICE CORROBORATION ALSO SATISFIED VERACITY PRONG

The veracity prong may also be satisfied by the police corroboration of the details of the anonymous letter. Police verified that the informant provided reliable information with respect to the defendants' home address and unusual travel plans. A number of cases have recognized that "the veracity of an unknown informer can be sufficiently determined by the searching officer's personal observation of some activity which is consistent with the tip but which would appear harmless without it." *United States v. Anderson*, 500 F.2d 1311, 1316 (5th Cir. 1974). See *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972), *Thompson v. White*, 406 F.2d 1176, 1178 (5th Cir. 1969), *Bailey v. United States*, 386 F.2d 1, 3 (5th Cir. 1967). See also 8A J. Moores Federal Practice, Rules of Criminal Procedure, par. 41.04 (1981 Cipes ed).

Adams v. Williams, 407 U.S. 143 (1972) is one such case and its holding is inconsistent with that of the Illinois Supreme Court in the instant case. The hearsay tip relied upon in *Adams* would have been deficient had this Court followed the Illinois Supreme Court's interpretation of the *Aguilar* veracity prong. There was no evidence that the informant who told the officer that the defendant had a gun and illicit narcotics had ever given police reliable information in the past. The tip contained no admissions against the informant's penal interest. The gun found on the defendant might well have been licensed and so was not incriminating

in and of itself. Yet this Court approved reliance upon the tip, reasoning that the discovery of the gun in precisely the place indicated by the informant lent credence to the informant's further report of narcotics.

Adams was correctly decided. The furnishing of reliable information by the informant in the present is as good an indication of his veracity as is his furnishing of reliable information in the past. As Justice White put it in his concurrence in *Spinelli v. United States*, 393 U.S. 410, 426 (1969) (White, J. concurring) in discussing the facts of *Draper*, "Unquestionably, verification of arrival time, dress and gait reinforced the honesty of the informant — he had not reported a made up story."

DETAIL OF INFORMANT'S LETTER AND EXTENT OF POLICE CORROBORATION SATISFIED THE BASIS OF KNOWLEDGE PRONG

Turning now to the basis of knowledge prong — the requirement that there be evidence that the informant acquired his information in a reliable manner. The Illinois Supreme Court was wrong when it held that the anonymous letter failed to satisfy the basis of knowledge prong because the tip did not purport to be based upon personal observation and the tip was not sufficiently detailed or corroborated.

This Court has approved reliance upon hearsay tips far less detailed and corroborated than the tip in the instant case even though the tips did not purport to be based upon personal observation. In *Adams v. Williams*, *supra*, discussed earlier, the tip did not purport to be based upon personal observation and contained only two details. Yet corroboration of only one of these details was held sufficient. In *Husty v. United States*, 282 U.S. 694 (1931) this Court unanimously

approved the search of a car based upon an informant's tip that there was bootleg liquor in the car together with police corroboration that the defendant had once been arrested for bootlegging, that his car was in the location and met the description indicated by the informant and that two of its occupants fled when police arrived.

The tip in this case was far more detailed and corroborated than was the tip in *Husty*. The informant here not only correctly predicted where the defendant's car was, essentially the only detail corroborated in *Husty*, but also how it got there, how the defendant would get to it, and where he would drive it once he got to it.

Similarly in *Jaben v. United States*, 381 U.S. 214 (1965) there was no indication how the third persons having knowledge of the taxpayer's financial conditions acquired that knowledge or even what that knowledge was. Yet this Court permitted reliance upon the undisclosed reports of the unnamed informants in the magistrate's determination of probable cause, reasoning that:

> There is a difference between disbelieving the affiant and requiring him to indicate some basis for his allegations. Obviously any reliance upon factual allegations necessarily entails some degree of reliance upon the credibility of the source. See, e.g., Johnson v. United States, 333 U.S. 10, 13, 92 L ed 436, 439, 678 S Ct 367. Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. Compare United States v. Ventresca, 380 U.S. 102, 13 L ed 2d 684, 85 S Ct 741. It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the

> charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process. *Id.* at 224-225.

Surely the information provided by police to the magistrate in the instant case met and exceeded this standard.

As noted earlier, the details of the informant's tip in this case and the extent of police corroboration compare favorably to the facts of *Draper*, another case in which the informant did not say how he acquired his information and a case *Spinelli* recognizes as satisfying the basis of knowledge prong. As was said of the *Draper* decision in *Spinelli v. United States*, 393 U.S. 410, 417-418 (1969) so may it be said here. Once the police verified the informant's detailed prediction of Lance Gates' unusual travel plans, — that he would fly to Florida, to meet his own car which his wife had already driven to Florida and that he would immediately drive it back toward Illinois, — it became "apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established."

AGUILAR TWO PRONG ANALYSIS SHOULD BE OVERRULED

Petitioner submits that the magistrate's determination of probable cause in the instant case was proper under any standard of probable cause this Court has employed. Nevertheless, this case affords the Court an appropriate vehicle for reexamining the *Aguilar* two prong analysis which guided the Illinois Supreme Court in the instant case.

This Court's treatment of the *Aguilar* two prong analysis "illustrate[s] a not unusual characteristic of legal development: broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely upon are no longer tenable." *Cabell v. Chavez-Salido*, __U.S.__, 70 L.Ed.2d 677, 681, 102 S.Ct. __ (1982). Petitioner respectfully submits that the *Aguilar* two prong analysis has become outmoded in light of this Court's subsequent decisions in *Adams v. Williams*, 407 U.S. 143 (1972); *Chambers v. Maroney*, 399 U.S. 42 (1970); and *Jaben v. United States*, 381 U.S. 214 (1965). To the extent that the *Aguilar* analysis differs from the analysis employed in these decisions it should be formally overruled.

PRIOR TO *AGUILAR* THIS COURT FOLLOWED THE RULE THAT A DETERMINATION OF PROBABLE CAUSE COULD BE BASED UPON HEARSAY EVIDENCE SO LONG AS THERE WAS SUBSTANTIAL BASIS FOR CREDITING THE HEARSAY

Prior to *Aguilar* this Court followed the rule that a determination of probable cause could be based upon hearsay evidence so long as there was substantial basis for crediting the hearsay. See *Jones v. United States*, 362 U.S. 257 (1960). See also *Rugendorf v. United States*, 376 U.S. 528 (1964). Whether there was substantial basis was decided according to the facts and circumstances of the particular case and without resort to technical rules of evidence or their equivalent. As this Court explained in *Brinegar v. United States*, 338 U.S. 160, 175 (1949):

> "In dealing with probable cause,. . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical

> considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

The focus of inquiry under this standard was on whether the facts and circumstances known to the officer or magistrate were sufficient to warrant a prudent person in the belief that an offense was being committed or that contraband would probably be found in a particular place. The hearsay nature of evidence relied upon went to its weight, as it bore upon that question, and was considered along with the other circumstances of the case.

AGUILAR ANALYSIS BROKE FROM THE TRADITIONAL RULE

Aguilar v. Texas, 378 U.S. 108 (1964) could have been decided with the same result under the *Jones-Brinegar* standard. The search warrant affidavit held inadequate in *Aguilar* contained no corroboration or anything else to substantiate the hearsay informant's bare assertions. But instead of simply relying upon the old *Jones* substantial basis test this Court articulated a more formal rationale for its decision.

In effect *Aguilar* created an exclusionary rule of evidence governing the admissibility of hearsay in determinations of probable cause. Hearsay could not be considered unless a proper foundation was laid. There must be evidence that the hearsay informant was a credible person or his information reliable. There must also be evidence that he acquired his information from personal observation or from a second hearsay informant who qualifies as a competent witness under both prongs of the analysis. See generally, Moylan, Hearsay and Probable Case: An *Aguilar* and *Spinelli* Primer, 25 Mercer L. Rev. 741 (1974).

AGUILAR TWO PRONGED ANALYSIS HAS PROVEN UNWORKABLE AND HAS BEEN REPEATEDLY REJECTED BY THIS COURT IN FAVOR OF THE TRADITIONAL STANDARD

For a variety of reasons, the original formulation of the *Aguilar* two pronged analysis proved unworkable. The veracity prong, to take one example, was written with paid police informants in mind; people whose credibility could be proven by evidence that they had furnished reliable information in the past. The prong was illsuited for cases involving citizen informers; ordinary citizens who had not informed in the past but whom police believed because there was no reason to disbelieve them.

There were also problems with the basis of knowledge prong. Even in the courtroom "witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion." Advisory Committee Note to Rule 701 of the Federal Rules of Evidence quoted in 11 J. Moore's Federal Practice, §701.01 (1976). Lay witnesses often use their opinions "as a shorthand rendition of a set of collective facts otherwise difficult to state." *United States v. Milne*, 487 F.2d 1232, 1235 (5th Cir. 1973). Police informants suffered from the same shortcomings and in exigent circumstances or in the case of anonymous tips it was not always possible for police to correct the problem and elicit each and every observation which led them to their conclusions.

To deal with these practical difficulties this Court added refinements to the *Aguilar* analysis. In *United States v. Ventresca*, 380 U.S. 102 (1965) this Court held that hearsay informants who were full-time government investigators engaged in the same investigation as the affiant were presumptively credible.

In *Spinelli v. United States*, 393 U.S. 410 (1969) this Court held that the basis of knowledge prong could be satisfied if the tip was sufficiently detailed that it could be inferred that the information was acquired in a reliable manner. In *United States v. Harris*, 403 U.S. 573 (1971) a plurality of this Court held that admissions against the informant's penal interest could satisfy the veracity prong.

Despite these refinements the *Aguilar* two pronged analysis remained unworkable. This Court began to ignore the two pronged test in favor of the traditional common sense approach. In *Jaben v. United States*, 381 U.S. 214 (1965) for example, a tax prosecution, this Court approved a determination of probable cause based in part upon undisclosed hearsay even though the affidavit said nothing about the credibility of the informants or their basis of knowledge. This court reasoned that the affidavit presented enough information "to the Commissioner to enable him to make the judgment that the charges are not capricious. . ." *Id.* at 224-225. *Aguilar* was distinguished as involving a "garden variet[y]" of crime. *Id.* at 224.

In *Chambers v. Maroney*, 399 U.S. 42 (1970), an armed robbery prosecution, this Court approved a determination of probable cause based upon hearsay reports from citizen eye witnesses even though there was no evidence of the informant's credibility or reliability. *Aguilar* and *Spinelli* were not even mentioned and the case was decided under the old common sense totality of the circumstances approach that preceded *Aguilar* and *Spinelli*.

In *Adams v. Williams*, 407 U.S. 143 (1972) this Court approved a determination of probable cause based upon a hearsay report from an informant who had never provided reliable information in the past and who did not say how he acquired his information. *Aguilar* and *Spinelli* were not discussed. Instead this Court cited *Brinegar* and its rule that

probable cause deals with probabilities not technicalities. See *Adams v. Williams*, 407 U.S. 143, 149 (1972) quoting from *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

PERSISTENCE OF *AGUILAR* TOGETHER WITH SUBSEQUENT DECISIONS OF THIS COURT REJECTING THE *AGUILAR* ANALYSIS HAS CONFUSED THE LOWER COURTS AND POLICE

Lower courts have not felt as free to ignore or distinguish the *Aguilar* two pronged analysis and have been forced to grapple with the analysis which this Court has repeatedly rejected as unsuitable or unsatisfactory. They have also been put to the task of reconciling *Aguilar* with the subsequent decisions that distinguish or ignore it. As a result of all this, the question of hearsay and probable cause, which prior to *Aguilar* was fairly simple, has become exceedingly complex and arcane.

One commentator devotes over 140 pages of a treatise on the Fourth Amendment to the question of when police and magistrates may and may not rely upon hearsay information in forming judgments as to probable cause. See 1 LaFave, Search and Seizure 499-642 (1978). Another commentator writes that "The *Aguilar-Spinelli* formulation has provoked apparently ceaseless litigation which indeed constitutes the bulk of probable cause law." 8a J. Moore's Federal Practice par. 41.04 (1981 Cipes ed.) Another commentator complains that many courts fail to appreciate the "subtleties" of the *Aguilar-Spinelli* doctrine. He warns that "a slipshod application" of the two prong test "calls down upon us the full fury of Murphy's law." "What can go wrong, will go wrong." Moylan, Hearsay and Probable Cause: An *Aguilar* and *Spinelli* Primer, 25 Mercer L. Rev. 741, 786, 786 n.137

(1974). This same commentator advises patience in working through the subtleties and practical problems of the two prong test. He reminds critics of *Aguilar* "that it took the better part of two centuries for the common law to hammer out the hearsay rule and its various and numerous exceptions in a trial setting... That some growing pains are inevitably being experienced, as we evolve analogous guidelines for the reception of hearsay in a probable cause setting, is not to be unexpected." *Id.* at 786 n.135.

The subtleties, complexities and growing pains of the *Aguilar* two prong test lead to two sorts of problems. First, police invade the privacy of individuals in violation of their Fourth Amendment rights because the police or the magistrates upon whom they rely, honestly fail to understand the two prong test (or more accurately, how some court will subsequently interpret it.) Second, because of this first problem, evidence is excluded in circumstances in which the exclusion will have no deterrent effect on similar police conduct in the future and serves only to keep unimpeachable and probative evidence from the trier of fact. See *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J. dissenting).

THIS COURT SHOULD FORMALLY OVERRULE THE *AGUILAR* ANALYSIS IN FAVOR OF THE ANALYSIS EMPLOYED IN *ADAMS, WILLIAMS,* AND *JONES v. UNITED STATES.*

The time has come to put an end to this confusion and the problems that it has spawned. Police need workable rules. As this Court recognized in *Dunaway v. New York*, 442 U.S. 200, 213-214 (1979), in the area of probable cause:

> "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

The *Aguilar* two pronged analysis cannot be that "single, familiar standard." The two pronged test is neither single nor familiar. It is a complex mass of rules, subrules, presumptions and ill-defined exceptions and it is bordered by areas where the analysis does not apply.

The *Brinegar-Jones* standard, by contrast, is "a practical, nontechnical conception affording the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). See also *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

The standard is single; it may be applied in all circumstances. The standard is familiar, it is the standard this Court applied both before and after *Aguilar*. And the standard is workable. The standard recognizes, as *Aguilar* does not, that:

> "In dealing with probable cause,... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.
>
> * * *
>
> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some

> mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.... Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 175, 176 (1949).

The *Brinegar-Jones* standard recognizes that it is impractical to prescribe a general rule to govern the admissibility of hearsay in determinations of probable cause. As this Court observed in *Adams v. Williams*, 407 U.S. 143, 147 (1972) "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation." Accordingly, the *Brinegar-Jones* standard deems all hearsay admissible and leaves its weight to be determined according to the facts and circumstances of the particular case. This is a sensible rule. As this Court observed in *United States v. Matlock*, 415 U.S. 164 (1974) in considering whether hearsay evidence should be excluded from suppression hearings:

> "There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." *United States v. Matlock*, 415 U.S. 164, 175 (1974).

The *Brinegar-Jones* standard is the standard that this Court has in fact applied, at least since 1970, in reviewing determinations of probable cause based upon hearsay evidence. There would be no harm and much good in making this official and formally overruling the *Aguilar* two prong analysis.

CONCLUSION

Because of the foregoing, the decision of the Illinois Supreme Court should be reversed.

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Respondent's Brief

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No. 81-430

In the

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

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CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed persons and government entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether An Anonymous Tipster, Who States His/Her Own Opinions Or Conclusions About The Possibility Of Prospective Criminal Activity, Can Provide Constitutionally Acceptable Probable Cause For The Issuance Of A Search Warrant, Under Article I, Section 6 Of The Illinois Constitution And The Fourth Amendment To The United States Constitution?

(2) Whether The Trial Court, The Illinois Appellate Court And The Illinois Supreme Court Properly Affirmed The Quashing Of A Search Warrant Where The Underlying Affidavit Failed To Meet The *Jones-Aguilar* Tests?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 81-430

THE STATE OF ILLINOIS,

Petitioner,

vs.

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Respondents.

BRIEF FOR THE RESPONDENTS

I.

ORIGINAL RULING

On August 31, 1978, the Honorable Judge William V. Hopf, then a Judge of the Circuit Court of DuPage County Illinois, heard arguments in connection with quashing *vel non* of the search warrant in this case. No evidence was taken. Based on the arguments of counsel, Judge Hopf[1] continued the disposition of the GATES

[1] In 1981 Judge Hopf was appointed to the Illinois Appellate Court, Second District. He is now Justice Hopf.

Motion To Suppress until September 18, 1978 (Tr. 52).[2] On a date not disclosed by the record Judge Hopf entered an order quashing the search warrant and suppressing the evidence. The People appealed that suppression order.[3]

II.

JURISDICTION

The Illinois Supreme Court affirmed both the trial and appellate courts on June 26, 1981, *Illinois* v. *Gates*, 85 Ill. 2d 376, 423 N.E. 2d 887 (1981) (Justices Moran and Underwood, dissenting). A timely petition for certiorari was filed and this Court granted certiorari on January 11, 1982. The jurisdiction of the Supreme Court of the United States to hear this case was based on 28 U.S.C. § 1257(3).

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[2] TR. will refer to the single transcript of proceedings available to the respondents in this case. The respondents do not have any transcript of September 18, 1978 nor has that transcript been provided by the Petitioner, The State of Illinois. Likewise, any final order from the trial court is not to be found either in the Petition for Certiorari or the joint appendix. The Rules of this Court provide that such orders shall be included in the joint appendix or the record filed with the Clerk of the Court.

[3] In *People* v. *Gates*, 82 Ill. App. 3d 749, 403 N.E. 2d 77 (2d Dist., 1980) the Court affirmed the ruling below.

III.

CONSTITUTIONAL PROVISIONS

Article 1 § 6 of the 1970 Illinois Constitution states:

SECTION 6. SEARCHES, SEIZURES, PRIVACY AND INTERCEPTIONS

The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

United States Constitution amendment IV.;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution amendment XIV.;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A.

STATUTES

Ch. 38, Illinois Revised Statutes, § 114-12 (1976) (reproduced as appendix 1, *infra*).

IV.

STATEMENT OF THE CASE

The statement of the case offered by the Attorney General is to some extent both inaccurate and misleading. Accordingly, we offer our corrections.

There seems no dispute that on May 3, 1978 the Bloomingdale Police Department received an anonymous handwritten letter. That handwritten letter is accurately reproduced at pg. 3 of the Attorney General's brief (hereafter A.G. Br.). Thereafter the A.G. Br. states that the Illinois Secretary of State reported that there was an Illinois driver's license issued to a Lance Gates at a "stated address" in Bloomingdale, Illinois. For the sake of accuracy, in that this is a search warrant case, the exact address supplied was 209-D Dartmouth, Bloomingdale, Illinois (Tr. 9, August 31, 1978). Thereafter the affiant for the search warrant had conversation with a *reliable informant* who apparently reviewed some financial records and reported a NEW (??) address for Lance Gates in Bloomingdale, Illinois. The NEW address is not set out at either pg. 3 or 4 of the A.G. Br. In reality, the affidavit for the search warrant states that the reliable informant told affiant that "he located one

Lance B. Gates residing at 198-B Greenway Drive, Bloomingdale, Illinois" (Tr. 10).[4]

The A. G. Br. at pg. 4 goes on to tell this Court that the affiant for the search warrant spoke to a DEA agent who reported that "Lance Gates" had boarded an Eastern Airlines flight 245 bound for Florida (A.G. Br. at pg. 4). The transcript of the hearing shows:

> "On May 5, 1978 I was contacted by Agent William Morely of the Drug Enforcement Administration. He stated that, pursuant to prior arrangement between us, he had maintained a surveillance on all passengers boarding Eastern Airlines Flight No. 245. He stated further that an individual *using the name Lance Gates and matching the physical description furnished by the Secretary of State in the attached message boarded flight 245 bound for Florida.*"

That is Paragraph 6. (Tr. 13)[5]

The A.G. Br. at pg. 4 states:

> "Based on the anonymous letter, the described information obtained from the law enforcement authorities, and the *verification of the address* obtained from the confidential informant, Mader, on May 6, sought and obtained in the Circuit Court of DuPage County, a search warrant for both the Gates' resi-

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[4] The actual search warrant, or a reproduction thereof, is not found in the petition for certiorari or the joint appendix. Thus, we are reviewing a search warrant case where the petitioner has not reproduced the search warrant or the trial court's order sustaining the motion to quash and the trial court's reasons for same (cf., Ill. Rev. Stat. Ch. 38 § 114-12(c)(e); App. 1 *infra*).

[5] The communication from the Illinois Secretary of State had information in addition to an address. The additional information is not reproduced in the A.G. Br. or Petition For Certiorari.

dence in Bloomingdale and the car they were driving in Florida."

The hearing transcript of August 31, 1978 includes the following:

> "I then directed the radio operator to contact the security office of Illinois Bell Telephone Company and was told by the radio operator that 980-8427 was a non-published phone number issued to Lance Gates at 189-B Greenway Drive, Bloomingdale, Illinois." (Tr. 12)[6]

V.

SUMMARY OF ARGUMENT

The unusual aspects of this case include the suggestion that a single search warrant (not included in the petitioner's cert. petition, brief or appendix) justified the search of an automobile and a home. The primary thrust of both the petition for certiorari and the attorney general's brief . . is that *AGUILAR* SHOULD BE OVERRULED.[7]

The position of the respondents will be to the contrary. It is the position of the respondents that *Aguilar* provides an adequate framework for the viability *vel non*

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[6] The word "verification" is at best, inaccurate. The information received by the affiant for the search warrant had three (3) separate addresses . . 209-D Dartmouth, Bloomingdale (Tr. 9); 189-B Greenway Drive, Bloomingdale (Tr. 12); and 198-B Greenway Drive, Bloomingdale (Tr. 10). Only the information supplied by a confidential informant who had certain financial records gave the 198-B address. Thus, the word "verification" would hardly seem appropriate under the circumstances of this litigation.

[7] A.G. Br. at 23-24, 29-31.

of affidavit(s) used to support either arrest or search warrants.[8] It is the position of the respondents that *Aguilar* only refined both *Draper*[9] and *Jones*.[10]

The respondents will review in their Argument the evolution of *Aguilar*. We shall point out that there is precious little difference as between *Aguilar* and *Jones*.

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[8] In *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), Mr. Justice Rehnquist and Chief Justice Burger dissented. In part, that dissent states:

> "First, it could decide that the warrant requirement was satisfied when such a magistrate had been persuaded, and allow no further collateral attack on the warrant. In *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the Court in reliance on *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), a case concededly decided pursuant to Fed. Rule Crim. Proc. 4, nonetheless held that the determination by a magistrate that the affidavit submitted to him made out "probable cause" for purposes of the Fourth and Fourteenth Amendments was subject to later judicial review as to the sufficiency of the affidavit. This rule was later reaffirmed in *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The Court has thus for more than a decade rejected the first possible stopping place in judicial re-examination of affidavits in support of warrants, and held that the legal determination as to probable cause was subject to collateral attack. *While this conclusion does not seem to me to flow inexorably from the Fourth Amendment, I think that it makes a good deal of sense in light of the fact* that a magistrate need not be a trained lawyer, see *Shadwick, supra*, and *therefore may not be versed in the latest nuances* of what is or what is *not "probable cause" for* purposes of the *Fourth Amendment*.
> (438 U.S. at 184-185, 98 S. Ct. at 2690)

[9] *Draper* v. *U.S.*, 358 U.S. 307 (1959).

[10] *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

Consequently, we will urge that there is no need to overrule *Aguilar*.

(2). The respondents view this case as inappropriate for certiorari. The Court below affirmed the original suppression under both the U.S. Constitution and the Illinois Constitution. The opinion below, in *People* v. *Gates*, 85 Ill. 2d 376, 423 N.E. 2d 887 (1981) commences with the following:

> ". . . Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property."
> (82 Ill. 2nd at ....., 423 N.E. 2d at 889).

This Court may, therefore, dismiss the certiorari petition as improvidently granted, or in the alternative, remand the case to the Illinois Supreme Court for clarification as to the ground upon which the judgment below rested.[11] Additionally, the respondents will point out that the PROBABLE CAUSE standard for Illinois search warrants differs from the federal standard and the Court

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[11] See *California* v. *Krivida*, 409 U.S. 33, 35, 93 S. Ct. 32, 33, (1972). In *Delaware* v. *Prouse*, 440 U.S. 648, 99 S. Ct. 1391 (1979) the court declined, while affirming the order of suppression below, to either dismiss or remand where it seemed somewhat unclear whether the decision below rested on State Constitutional grounds (440 U.S. at 652, 99 S. Ct. at 1395). It is also interesting to note that the Delaware Constitutional provision as reviewed in *Delaware* v. *Prouse* was Art. I § 6 (the Fourth Amendment equivalent) . . just as the Illinois Constitution is Art. I § 6 (the Illinois equivalent to the Fourth Amendment of the Illinois Constitution).

below considered Illinois as well as federal law while affirming the trial court's order of suppression.[12]

(3). The respondents will review the warrantless arrest cases consistently cited by the petitioner; with a view toward attempting to demonstrate that those decisions are not capable of supporting an overruling of *Aguilar*.[13]

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[12] *Inter alia*, the Illinois Supreme Court, cited *People* v. *Garcia*, 27 Ill. App. 3d 396, 326 N.E. 2d 497 (1975); *People* v. *Linder*, 24 Ill. App. 3d 995, 322 N.E. 2d 329 (1975).

[13] *Adams* v. *Williams*, 407 U.S. 143 (1972); *Brinegar* v. *U.S.*, 338 U.S. 160 (1949); *Carroll* v. *U.S.*, 267 U.S. 132 (1925); *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

VI

ARGUMENT

A.

From Draper to Franks . . the evolution of hearsay as it relates to Probable Cause.

The beginning point is the Court's decision in *Draper* v. *U.S.*, 358 U.S. 307, 79 S. Ct. 329 (1959). In *Draper*, a previously utilized and reliable informant, Hereford, told a federal drug agent, Agent Marsh, that Draper had recently taken up an address (a stated address) in Denver. Hereford told Marsh that Draper was selling drugs to several addicts in the Denver area. Some four days (4) days later, Hereford told Marsh . . that Draper had gone to Chicago the day before, by train and that he would return by train with three (3) ounces of heroin on either September 8 or September 9 [1958]. Hereford described Draper [to Agent Marsh] as being a male negro, light brown complexion, 27 years of age, 5 feet 8 inches tall, 160 pounds,[14] and that he was [or would be wearing] a light colored raincoat, brown slacks, and black shoes. Hereford also told Marsh . . that Draper would be carrying a tan zippered bag and that he [Draper] habitually walked . . real fast (358 U.S. at 309, 78 S. Ct. 331). On September 9, 1956, Agent Marsh was at the Denver Union Station and on that morning he saw a person with the exact physical attributes and wearing the precise clothing described the informant alight from an incoming train from Chicago. Marsh watched the person [Draper] walking "fast" and carrying a tan zippered bag in his right hand (all in accordance with the informa-

[14] 358 U.S. 309 n. 2, 79 S. Ct. 331, n.2.

tion supplied by the reliable informant, Hereford). In *Draper,* the question before the Court was whether all the facts and circumstances gave Agent Marsh "probable cause" to conduct a warrantless arrest of Draper and search his person incident to that lawful arrest (358 U.S. at 311, 79 S. Ct. at 332). This Court held that the specific and exact information supplied by the previously reliable informant, even though hearsay, as to Agent Marsh, could provide ample probable cause for the warrantless arrest and search of Draper.[15]

The *Draper* facts included a previously reliable informant giving exact facts as to a person, place, and location of drugs. The information supplied was so detailed and precise that probable cause existed for the warrantless arrest of Draper..

The litigation at bar involves loose information from an anonymous tipster. The "anonymous tipster" not only lacked reliability but provided precious few "facts" (for example, no address was given for either Lance or Susan Gates, no physical description of either person, and certainly no suggestion that the "anonymous tipster" got his information (or her information) first hand or second hand or through gossip or rumor).

Thus for the Petitioner to liken the anonymous tipster in this case to the proven reliable informant . . in *Draper*

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[15] Today, the search of the tan zippered case being carried by Draper might not have survived a Fourth Amendment challenge, see *Robbins* v. *California,* 453 U.S. ....., 101 S. Ct. 2841 (1981); *Arkansas* v. *Sanders,* 442 U.S. 753, 99 S. Ct. 2586 (1979); *U.S.* v. *Chadwick,* 433 U.S. 1, 97 S. Ct. 2476 (1977). The question is now before the Court in *U.S.* v. *Ross,* ..... U.S. ....., ... S. Ct. ....., Cert. granted, October 13, 1981, #80-2209).

is to suggest to this Court that any individual providing information to law enforcement agents . . automatically becomes a reliable informant. Such is not now, nor ever has been, the law.

Following *Draper*, the Court decides *Jones* v. *U.S.*, 362 U.S. 257, 80 S. Ct. 725 (1960). In *Jones*, the Court reversed a federal drug conviction on the question of whether Jones was unreasonably denied the opportunity to seek suppression. The Court held that Jones was unreasonably denied that opportunity and accordingly vacated the conviction. However, the Court did review the affidavit for the search warrant in *Jones* and the Court, for the first time, concluded that hearsay could be the basis for a search warrant (362 U.S. at 271, 80 S. Ct. at 736). The Court, pointed out, that the informant in *Jones* had been reliable in that the informant had previously given accurate information and had bought narcotics from Jones in the apartment a day earlier (id. at 271). Mr. Justice Frankfurter, for the Court, stated:

> "We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was *a substantial basis for crediting the hearsay.*" (362 U.S. at 272, 80 S. Ct. at 736). (Emphasis supplied)

Thus as between *Jones* and *Draper* there can be little question that hearsay . . so long as there was a *substantial* basis for its accreditation could provide probable cause

both for a warrantless arrest and an affidavit to support a search warrant.[16]

In *Aguilar* v. *Texas,* 378 U.S. 108 (1964), the Court, building on the *Draper-Jones* precedents vacated the drug conviction while reviewing the sufficiency of an affidavit for a search warrant. The Court found the affidavit to be insufficient in that the affidavit contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained in the affidavit and it did not contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. From all that appeared, the court concluded:

> "The source here merely suspected, believed or concluded that there were narcotics in Petitioners possession."
> (378 U.S. at 114).

In *U.S.* v. *Ventresca,* 380 U.S. 102, 85 S. Ct. 741 (1965), the Court overruled the Court of Appeals decision and upheld an affidavit for a search warrant based upon hearsay information. The Court quoted from *Jones* and

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[16] In *U.S.* v. *Harris,* 403 U. S. 573 (1971), the Court, as per Chief Justice Burger referred to *Jones* as follows:
> "*Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones.* And unless *Jones* has somehow, without acknowledgment, been overruled by *Spinelli,* there would be no basis whatever for a holding that the affidavit in the present case is wanting. The affidavit in the present case, like that in *Jones* contained a substantial basis for crediting the hearsay. Both affidavits purport to relate the personal observations of the informant — a factor that clearly distinguishes *Spinelli,* in which the affidavit failed to explain how the informant came by his information."
(403 U.S. at 583)

Aguilar, with approval. Contrary to the A. G. statement on pg. 26 of their brief, the Court observed that fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. The attorney general refers to the "fellow officers" as hearsay informants, plainly not the meaning of the Court in *Ventresca*.

In *Spinelli* v. *U.S.*, 393 U.S. 410, 89 S. Ct. 584 (1969), this Court granted certiorari so that the principles announced in *Aguilar* could be further explicated.[17] *Spinelli*

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[17] This was the language used by Justice Harlan at pg. 413. Both *Andresen* v. *Maryland*, 427 U.S. 463, 96 S. Ct. 2737 (1976) and *Zurcher* v. *Stanford Daily, et al.*, 436 U.S. 547, 98 S. Ct. 1970 (1978) discussed in part, search warrants. In *Andresen*, the Court relies on *Aguilar* while finding that the affidavit(s) provided ample probable cause for the search warrant, 427 U.S. at 477, n.9, 96 S. Ct. 2747, n.9. In *Zurcher* the Court held that search warrants are directed at places and things, not persons and that probable cause to search does not depend on the culpability of the owner of the premises. A Probable Cause discussion is found in *Zurcher*, 436 U.S. at 557, n.6, 98 S. Ct. at 1977, n.6. The Probable Cause standards are different as between search warrants and arrests. *Zurcher* states:

> "Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonable grounds to believe'—sometimes stated 'probable cause to believe'—that a felony has been committed by the person to be arrested. Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be

created the now familiar language "two-pronged" test, when referring to *Aguilar*. In declaring the search warrant to be invalid, the Court measured the search warrant against the standards announced in *Aguilar* and concluded that the tip did not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli is running a bookmaking operation. More importantly, the Court held that the informant did not state that he ever personally observed Spinelli at work or that he had ever placed a bet with him.

In *U.S.* v. *Harris,* 403 U.S. 573, 91 S. Ct. 2075, (1971), this Court had before it a search warrant based upon hearsay information which seemingly failed to meet the "second-prong" of *Aguilar,* namely the "veracity-prong". The Court in upholding the search warrant noted that the affidavit contained statements by the informant which were against him own penal interest and that the affiant officer stated that the informant feared for his life and safety if his identity were revealed. These admissions, the Court held, carried their own *indicia* of credibility sufficient to support the finding of probable cause to search.

In *Franks* v. *Delaware,* 438 U.S. 154, 98 S. Ct. 2674 (1978), this Court held for the first time that a defen-

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[17] (Continued)

supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.

"In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." Comment, 28 U.Chi.L.Rev. 664, 687 (1961) (footnotes omitted). (98 S.Ct. at 1977, n.6, in part).

dant may challenge at an evidentiary hearing the statements made by an affiant to support probable cause for the issuance of a search warrant. The Court cited *Aguilar* with approval but stated:

> "Because it is the magistrate who must determine independently whether there is probable cause, *Johnson* v. *United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948); *Jones* v. *United States,* 362 U.S. 257, 270-271, 80 S.Ct. 725, 735-736, 4 L.Ed.2d 697 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment."
> (438 U.S. at 166)

THE AGUILAR STANDARDS

The Court below, and earlier decisions of this Court, have referred to the *Aguilar* standards. The *Aguilar* standards are basically [or is basically] a "two-prong test". As *Aguilar* stated:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States,* 376 U.S. 528, 84 S.Ct. 825, was "credible" or his information "reliable."
>
> (378 U.S. at 114, n.5 om.; 84 S. Ct. at 1514, n.5 om.).[17a]

[17a] In the instant case there is no contention that the magistrate issuing the search warrant was provided with

The "two prong" test as it is now known, was first stated as such in *Spinelli* v. *U.S.*, 393 U.S. 410, 89 S. Ct. 584 (1969). In *Spinelli*, the Court stated:

> "We are then, required to delineate the manner in which *AGUILAR'S* TWO- PRONGED TEST should be applied in these circumstances" (393 U.S. at 413, 89 S. Ct. at 587, emphasis ours).

The "two-pronged" analysis or test is nothing more than:

> "First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was "'credible' or his information 'reliable.'" (393 U.S. at 413, 89 S. Ct. at 587).

The first prong has come to be known as the "basis of knowledge" prong, which refers to the underlying circumstances of the informant's conclusion that criminal activity exists. The second prong, has come to be

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[17a] (Continued)

any information other than that contained in the affidavit. Indeed, the Illinois law prior to *Franks* v. *Delaware* precluded going beyond the four (4) corners of the affidavit . . see *Franks* at 438 U.S. 179, 98 S. Ct. at 2688.

In *U.S.* v. *Karathanos*, 531 F.2d 26 (CA 2, 1976) (cert. den., 96 S. Ct. 3221) the Court affirmed the order of suppression below suggesting that neither the magistrate nor a reviewing court should be required to use imagination to supply essential details critical to the determination of probable cause (531 F2d at 31, citing *Aguilar* and *Giordenello* v. *U.S.*, 357 U.S. 480, 486, 78 S. Ct. 1245 (1958)).

known as the "veracity prong" which deals with the credibility of the informant or the reliability of the informant's information.

The Respondents, Lance and Susan Gates have consistently argued at the Trial Court, appellate Court and Supreme Court level that the search warrant failed to meet the Standards as enumerated above by this Court.

The "Basis of Knowledge" prong is directed at the question of *how* the tipster came to his knowledge. That is, did the tipster see something firsthand, hear something firsthand, or is he merely passing on a story or a rumor from someone else. The "Basis of Knowledge" prong is not concerned with the conclusions or opinions of the tipster, but is concerned with the raw data of his senses (sight, smell, sound). The reviewing magistrate will then be able to draw his own conclusions, and not rely on the conclusions or opinions of the tipster. This requirement of raw data is one of the two checks that an issuing magistrate has when dealing with hearsay information allegedly supportive of a search warrant. A concise explanation of the "Basis of Knowledge" prong is found in *Stanley* v. *State of Maryland,* 19 Md.App. 508; 313 A.2d 847, 858, 859 (1974) when Judge Moylan wrote:

> "*Aguilar* was concerned with the ultimate trustworthiness of hearsay information. All hearsay was not to be rejected out of hand; neither was all hearsay to be uncritically accepted; some guidelines had to be devised to separate the wheat from the chaff. *Aguilar* sought first to ascertain the actual source of the incriminating information. The "basis of knowledge" prong was designed to locate that source and to examine the validity of his conclusion. It was not concerned with the integrity of the infor-

> mant (that test would come later via the other prong) but only with his ratiocinative process—not with the honesty of his narration but with the nature of his perception: (How did he reach *his* conclusion" Did he see something or hear something firsthand or did he merely pass on a story or rumor from someone else: Or did he simply jump to a wrong conclusion on the basis of inadequate or ambiguous observations?) The simple thrust of the "basis of knoweldge" prong was that the informant must not pass on his conclusion, let alone the conclusion of someone else, but must furnish the raw data of his senses, so that the reviewing judge could draw his own conclusion from that data."

Applying that analysis to the facts of this case it is obvious that the anonymous letter contains *no statement* as to how the anonymous tipster came to his/her knowledge. The letter contains no claim that its author saw, heard or in any fashion claimed firsthand knowledge of his allegations.

The letter contains no raw data from which a magistrate could draw his own conclusions. Rather, it contains the opinions, conjecture and conclusions of the author. We know not whether they are based upon bar room gossip and we cannot assume otherwise.

As was succinctly stated by Judge Moylan in *Stanley*, (*supra*)

> "The 'basis of knowledge' test is not concerned one whit with an informant's honest or 'veracity'. It is concerned rather, with conclusionary validity. Even assuming credibility amounting to sainthood, the judge may not accept the bare conclusion of that credible informant anymore than he may accept the bare conclusion of a sworn and known trusted police-affiant (citing *Nathanson* v. *U.S.*, 290 U.S. 41; *Giordenello* v. *U.S.*, 357 U.S. 480)." 313 A. 2d at 861.

Thus, when the affiant police officer presented his complaint to the issuing magistrate, that magistrate was not "informed of some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were . . . (*Aguilar*, p. 114).

The second prong of *Aguilar* has been referred to as the "Veracity Prong". Since hearsay declarations can be the basis of a search warrant, a magistrate has to be convinced of the honesty (credibility) of the tipster, or of the truthfulness (reliability) of his information.

Concisely stated, the "Veracity Prong" meant:

> "Once having located the original source—the person who saw, heard or smelled something firsthand—then and only then did *Aguilar* look to the "veracity" of that source. As a substitute for the classic trustworthiness device of the oath, it sought some alternative guarantee that the declarant spoke truthfully. It sought "some of the underlying circumstances from which the officer concluded that his informant was 'credible', or his information 'reliable'." The "veracity" prong, in precise terms, has two disjunctive spurs, seeking, *either* a) the inherent "credibility" of the person himself *or* b) some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.
>
> In outline form, *Aguilar* was concerned with:
> The *Trustworthiness* of Hearsay
>
> I. The *Basis of Knowledge* Prong
> II. The *Veracity Prong*
> A. The *Credibility* Spur
> B. The *Reliability* Spur."
>
> *Stanley*, 313 A.2d at 858, 859.

This requirement is usually met by a recitation in the affidavit of previous instances in which the affiant police officer has obtained information from the informant that led to various arrests and convictions. (See *McCray* v. *Illinois*, 386 U.S. 300 (1967); also *People* v. *Garcia*, 27 Ill.App. 3d 396 (1975).

Here, the anonymous tipster was unknown to both the police and the magistrate. There was simply no way to conclude that the anonymous tipster was a credible person.

The Attorney General argues that corroboration cured the defect in the "Veracity Prong". Certainly this Court has held that a defect in the "Veracity Prong" of *Aguilar* may be cured by a showing that the information supplied is reliable.[18]

The only corroboration relied upon by the Attorney General is that the police located the defendants' home address (a fact not provided by the anonymous tipster) and that the police verified the defendants' travel plans.

This type of corroboration is certainly not what this Court had in mind when *Harris* was decided. Location of someone's home address and his travel plans are, at best, innocuous and innocent facts. They do not

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[18] In *U.S.* v. *Harris*, 403 U.S. 573, this Court considered the alternative requirement of "reliability" of the information supplied and concluded that the "Veracity" prong was satisfied where the in informant admitted certain activities that were against his own penal interest. . . *Harris*, is so-cited in *U.S.* v. *Karathanos*, 531 F.2d 26 at 31 (CA 2, 1976). In *U.S.* v. *McNally*, 473 F.2d 934 (CA 3, 1973) the court held that *Harris* did not overrule the two-pronged test (id. at 938-939).

tend to "corroborate" within the true meaning of *Harris* that "Criminal" activity is afoot. A vindictive travel Agent could supply that information.[19]

The *Aguilar* two-prong[ed] test is nothing more than a refinement of the standards set forth by this Court in *Jones* . . . as recognized by Chief Justice Berger in *Harris*. The petitioner's urging that *Aguilar* be overruled lacks both merit and substance. The *Jones-Aguilar* decisions provide a realistic way for Courts to review complaints and affidavits when the realistic basis for the complaints or affidavits rest with hearsay information. Indeed, *Jaben* v. *U.S.*, is not to the contrary (as suggested by the petitioner).

In *Jaben* v. *U.S.*, 381 U.S. 214, 331 U.S. 214 (1965) the court affirmed an Internal Revenue Tax evasion conviction finding that the filing of a complaint before a commissioner could extend an applicable limitation period in connection with the criminal prosecution of Federal Tax matters (381 U.S. at 220-221, 85 S.Ct. at 1368-1369). As may be applicable to our case, the Court reviewed the complaint filed and found it acceptable. However, the Court went on to review complaints filed before U.S. magistrates or commissioners, and the sufficiency of such complaints as follows:

> Establishment of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from many individually unrevealing facts which are not susceptible of a concise statement in a complaint. *Furthermore, unlike narcotics informants, for exam-*

[19] It appears from the August 31, 1978 transcript of proceedings that the airlines gave the police the phone number . . . which they later traced to an address inconsistent with the correct address (Tr. 11, 12).

> *ple, whose credibility may often be suspect,* the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us. 381 U.S. at 224, 85 S.Ct. at 1370-1371 (Emphasis supplied)
>
> • • • •
>
> Here the affiant, a Special Agent of the Internal Revenue Service, swore that he had conducted just such an investigation and thereafter swore that he had personal knowledge as to petitioner's actual income. In such circumstances, the magistrate would be justified in accepting the agent's judgment of what he "saw" without requiring him to bring the records and persons to court, to list and total the items of unreporated income or to otherwise explain how petitioner's actual income was calculated. 381 U.S. at 225, 85 S.Ct. at 1371

The respondents respectfully suggest that the affidavit at bar was insufficient to sustain either the search of the car or the home.[19] Accordingly, the respondents would urge that the decision below be affirmed.

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[19] In *U.S.* v. *Bailey,* 458 F.2d 408 (CA 9, 1972), the Court reversed a federal bank robbery conviction finding the search warrants for both a car and a home invalid under both *Aguilar* and *Spinelli.* While reversing, the Court stated:

> "In short, there is nothing but conjecture to sustain the conclusion that the house contained the objects of the search. As we observed in United States v. Lucarz (9th Cir. 1970) 430 F. 2d 1051, 1055:
>
> "[S]imply from the existence of probable cause to believe a suspect guilty, [it does not follow

(c)

THIS COURT SHOULD EITHER REMAND THIS CASE TO THE ILLINOIS SUPREME COURT FOR CLARIFICATION OR DISMISS THE CERTIORARI PETITION AS IMPROVIDENTLY GRANTED.

The respondents suggest that the record does not realistically disclose whether the holding below was based upon the Federal Constitution or on the Illinois Constitution, or both. Under such circumstances, this Court should vacate the granting of certiorari and remand this case to the Illinois Supreme Court for such proceedings as that court may deem appropriate, *California* v. *Krivda,* 409 U.S. 33, 93 S. Ct. 32 (1972).

The Illinois Courts have considered similar questions under the Illinois Constitution and the Illinois statutory scheme. The attack on the affidavit for the search warrant in the instant case was predicated on the lack of probable cause under definitions of probable cause supplied by the Illinois Supreme Court. For example, in *People* v. *Martin,* 70 Ill. App. 3d 36, 388 N.E. 2d 278 (4th Dist., 1979), the Court affirmed the suppression below where the affidavit was held to lack probable cause. While affirming suppression below, the Court reviewed the Illinois standard for probable cause for the issuance of the search warrant and the Illinois statutory scheme

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[19] (Continued)

> in all cases] that there is also probable cause to search his residence. If that were so, there would be no reason to distinguish search warrants from arrest warrants, and cases like Chimel v. California, 395 U.S. 752 [89 S.Ct. 2034, 23 L.Ed. 2d 685] (1969), . . . would make little sense." (458 F.2d at 412).

as regarding the trial judge(s) being statutorially empowered to suppress evidence. The Court stated:

> The substance of the State's argument on appeal is that Judge Steigmann's finding that probable cause to issue the warrant did not exist was merely a substitution of his views for the findings previously made by Judge Munch in issuing the warrant. The State would have us rule that once a magistrate issues a search warrant which he finds to be based on probable cause, another trial judge may not overturn that decision in ruling on a motion to suppress. We cannot agree with the State's argument. Such a holding would immunize the re-examination of the warrant issuance, and determine the ruling upon a motion to suppress.
>
> Probable cause for the issuance of a search warrant exists when "the facts and circumstances within the knowledge of the affiant, and of which he had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution to believe that the law was being violated and that evidence of it was in the premises or vehicle or on the person to be search." (*People* v. *Francisco* (1970), 44 Ill.2d 373, 376, 255 N.E.2d 413, 415.) Although the affiant need not show guilt beyond a reasonable doubt, it is axiomatic that probable cause necessarily encompasses more than a mere suspicion.
>
> Section 114-12(a)(2) of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1977, ch. 38, par. 114-12(a)(2) allows a defendant to challenge an unlawful search or seizure and to suppress any evidence so obtained on the ground that probable cause did not exist for the issuance of the warrant. This necessarily implies that the hearing judge has the authority to overturn the finding of the issuing judge that probable cause did exist. This record shows, as Judge Steigmann held, that the search warrant was

issued for the southwest apartment without a showing of probable cause. (388 N.E. 2d 29-280)

In *People* v. *Palanza*, 55 Ill. App. 3d 1028, 371 N.E. 2d 687 (3d Dist., 1978), the Court affirmed the order of suppression below finding that the affidavit for the warrant failed to state probable cause. The Court reviewed both *Jones* and *Aguilar* and concluded in this case, that the informant could not realistically supply probable cause because the complaint for the search warrant simply stated that he saw white powder which was represented by a male occupant of the premises to be cocaine and that the white power appeared . . . to the informant to be cocaine. It is interesting to note that in *Palanza* the State of Illinois acknowledged the existence of the *Aguilar* "twofold" test (id. at 688). The Court, while affirming the suppression below stated:

> It is well settled that the complaint or affidavit of a police officer made for the purpose of securing the issuance of a search warrant need not be made on personal knowledge only. (*Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697.) Where the affidavit or complaint is not based on personal knowledge, the parties agree that *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, established the twofold test governing the consideration of the complaint or affidavit by the judicial officer. *Aguilar* requires that the complaint or affidavit set forth facts upon which the police officer bases his conclusion that the third party is a reliable and credible source of information and also facts showing the basis of the third party's knowledge.
>
> On this appeal we are concerned with that part of the *Aguilar* test referred to as the "basis of knowledge test" or the "how" or "why" the third party informant knew of the information he was conveying.

> This requires disclosure of the underlying facts supporting the conclusions of the informant. This of course means as applied to the facts of this case, underlying facts from which the informant could conclude that the substance about which he was reporting was cocaine." (371 N.E.2d at 688)

The respondents respectfully suggest that in light of the Illinois Supreme Court basing its decision, in part, on the Illinois Constitution and indeference to this Court's repeated desire to establish comity as between this court and the State Supreme Courts, it is respectfully urged that this Court consider either dismissing the petition for certiorari as improvidently granted, or remanding this case to the Illinois Supreme Court for clarification.

(d)

THE WARRANTLESS ARREST/SEARCH DECISIONS CITED BY THE PETITIONER HAVE NO RELEVANCE TO THIS CASE.

The petitioner's brief makes frequent reference to a series of warrantless search cases (excluding *Draper*). While we feel these decisions have no relevance to the question presented, nevertheless we feel compelled to analyze at least some of the warrantless search cases most frequently referred to by the petitioner. In *Brinegar* v. *U.S.*, 338 U.S. 160, 69 S. Ct. 1302 (1949), the Court affirmed the conviction for the illegal transportation of liquor in violation of 18 U.S.C. § 1262 (repealed). The question in *Brinegar* was whether the stopping of Brinegar's car, absent a warrant, coupled with his voluntary admissions as to the transportation of illegal liquor, were sufficient to overcome the Fourth Amendment. The arresting agent in *Brinegar* had watched him [Brinegar]

loading liquor on two (2) prior occasions and knew that Brinegar had a reputation for hauling liquor (438 U.S. at 162, 69 S. Ct. at 1304). The Court, while affirming the conviction, likened the case to *Carroll* in that the probable cause for the stopping of the car in *Carroll* was based on Carroll's earlier attempts to sell liquor to those arresting agents (*Brinegar*, 338 U.S. at 165-166, 69 S. Ct. 1306) . . . while in *Brinegar*, the arresting agent had personally observed Brinegar unload liquor on two occasions.

The *Carroll/Brinegar* circumstances are certainly a far cry from the facts available to this Court involving Lance and Susan Gates. As to Lance Gates, a federal agent saw someone fitting his description boarding an aircraft for Ft. Lauderdale and later leave the same aircraft and go to a motel. No personal observations regarding any pretended illegality are even intimated. As to Susan Gates, all the record here reflects is that she was arrested outside of the premises at 198B-Greenway Drive, Bloomingdale, Illinois on May 7, 1978. The record is barren as to any other conduct by Susan Gates.

All of this is a far-cry from *Brinegar*.[20]

The petitioner cites *Adams v. Williams* at eleven separate places within their 32 page brief. Again, *Adams* is without relevance. In *Adams* v. *Williams*, 407 U.S. 143 (1972) the Court reversed the grant of habeas relief finding that information supplied by a previously reliable informant supported an officer's arrest of Williams and the seizure of a weapon from his person. The

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[20] *Brinegar* is cited at pp. 7, 15, 24, 27, 28, 30, of the petitioner's brief, while *Carroll* is cited at pp. 10, 14.

Court reviewed, while vacating the grant of relief, the background of the case which included the facts (approximately 2:00 AM. in a high-crime rate area) and the further fact that the arresting officer was alone and the information given the arresting officer by the reliable informant included that the potential arrestee was armed. Under such facts the Court vacated the grant of relief stating:

> While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear for his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. Terry v. Ohio, 392 U.S., at 30, 88 S.Ct., at 1884. 407 U.S. at 147-148, 92 S.Ct. at 1924

The record in the case at bar fails to even remotely suggest that the respondents were arrested in a high-crime area, at night, based on information that they were armed. We resist any temptation to comment on the further applicability of *Adams* to the the case at bar.

In *Chambers* v. *Maroney,* 399 U.S. 42, 90 S. Ct. 1975 (1970) the Court affirmed the dismissal of a petition for habeas relief finding no Fourth Amendment violation

in the warrantless search of an automobile, post-arrest, at a police station. The Court, citing *Carroll*, stated:

• • •

> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S., at 153-154, 155-156, 45 S.Ct. at 285-286.

The Court also noted that the search of an auto on probable cause proceeds on a theory wholly differenet from that justifying the search incident to an arrest:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." 267 U.S., at 158-159, 45 S.Ct. at 287.
>
> (*Chambers*, . . . citing *Carroll* 399 U.S. at 49, 90 S. Ct. at 1980).

However, the *Chambers* Court noted the realistic difference as between the warrantless search of a car and a home . . . as follows:

> "The same consequences may not follow where there is unforeseeable cause to search a house. Compare *Vale* v. *Louisiana, ante,* 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed. 409. But as *Carroll, supra,* held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

(399 U.S. at 52, 90 S. Ct. at 1981-1982).[21]

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[21] With a hazard of repetition we again suggest that neither *Chambers* nor *Carroll* can be viewed as despositive authority within the context of the case now before the Court. We are here reviewing the viability of

VII

CONCLUSION

Lance Gates, and Susan Gates, as respondents, respectfully urge that the decision below be affirmed.

Alternatively, the respondents urge that in light of the mixed constitutional findings below, that the petition for certiorari be dismissel as improvidently granted or that the case be remanded to the Illinois Supreme Court for further proceedings.

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[21] (C[illegible])
the search warrant issued under Illinois law (and contested and quashed under Illinois law) . . . said search warrant having been found invalid for either the search of the car or the search of the home. The petitioner has not sought relief by suggesting that either the car or the house could have been searched absent a warrant. Thus, their reference to *Chambers, Brinegar* and *Carroll* leave us rather puzzled as to whether they are going to urge the Court to grant relief on the basis of questions *not* presented herein.

APPENDIX

114-12. Motion to suppress evidence illegally seized

§ 114-12. Motion to suppress evidence illegally seized. (a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial.

(c) The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory ap-

peal from such order of suppression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph (a)(3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended, adn subsequent prosecution of such defendants upon such charges shall be barred.

(d) The motion shall be made only before a court with jurisdiction to try the offense.

(e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.
Amended by P.A. 79-1360, § 26, eff. Oct. 1, 1976.

Petitioner's Reply Brief

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No. 81-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES and SUSAN GATES,

Respondents.

On Writ Of Certiorari To
The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF ON MERITS

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In The

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October Term, 1981

THE STATE OF ILLINOIS,

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LANCE GATES and SUSAN GATES,

Respondents.

On Writ Of Certiorari To
The Supreme Court Of Illinois

PETITIONER'S REPLY BRIEF ON MERITS

ARGUMENTS

RESPONDENTS CHALLENGE CORROBORATION AS A METHOD OF VERIFYING HEARSAY

The search warrant in this case was issued on the basis of objective facts and circumstances sufficient to warrant a prudent person in the belief that illegal narcotics were probably present in the defendants' house and car. The magistrate had before him a detailed

anonymous letter verified through extensive corroboration. Moreover, the corroborating facts, even when viewed in isolation, were unusual, inviting of explanation, and suggestive of criminal activity.

Respondents argue that the search warrant was constitutionally defective, nevertheless, because the supporting affidavit did not say who sent the anonymous letter, how he acquired his information and whether he had given police reliable information in the past. Respondents contend that corroboration could not cure these defects. Therefore, respondents concluded, the anonymous letter should have been totally ignored.

Respondents base this argument entirely upon their interpretation of *Aguilar v. Texas*, 378 U.S. 108 (1964). According to respondents the *Aguilar* basis of knowledge rule is satisfied only when the affidavit states that the informant acquired his information through personal observation. Corroboration can never substitute. See Respondents' Brief at 19. The *Aguilar* veracity rule, respondents contend, may be satisfied only if the affidavit states that the informant gave police accurate information in the past or made admissions against his penal interest. Corroboration can substitute only if the corroborating facts are incapable of innocent explanation even when viewed in isolation. See Respondents' Brief at 21.

This last concession to corroboration is illusory. If police discover corroborating facts that are incapable of innocent explanation even when viewed in isolation, they would no longer need the hearsay tip. The corroborating facts, by themselves, would be more than sufficient to establish probable cause.

In practical effect, then, respondents urge a theory of the Fourth Amendment that would eliminate corrobora-

tion as a method of verifying hearsay relied upon in determinations of probable cause.

THIS COURT SHOULD REJECT RESPONDENTS' INTERPRETATION OF *AGUILAR*: CORROBORATION IS A VALID METHOD OF VERIFYING HEARSAY

This Court should reject respondents' argument. Their approach goes far beyond this Court's decision in *Aguilar v. Texas*, 378 U.S. 108 (1964), from which it purports to derive. In *Aguilar* the search warrant affidavit contained no corroborating circumstances and this Court said that if it had, "this would, of course, present an entirely different case." *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964).[1]

The method for verification of hearsay set forth in respondents' brief is one way hearsay may be verified. But it is *not* the only way. Hearsay may also be verified by corroboration, even if the corroborating facts are, when viewed in isolation, possibly innocent. As this Court explained in *Jones v. United States*, 362 U.S. 257, 269-270 (1960):

> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *Draper v. United States*, 358 U.S. 307, 3 L.Ed.2d 340, 79 S.Ct. 340. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that

[1] *Spinelli v. United States*, 393 U.S. 410 (1969) also recognized that hearsay could be verified through corroboration.

> the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations.

This is still good law. On numerous occasions both before and after *Aguilar* this Court has approved determinations of probable cause based on corroborated hearsay even though the hearsay failed to satisfy the standards set forth in respondents' brief. In *Husty v. United States*, 282 U.S. 694 (1931); *Draper v. United States*, 358 U.S. 307 (1959); *Jaben v. United States*, 381 U.S. 214 (1965); *Adams v. Williams*, 407 U.S. 143 (1972); and *Colorado v. Bannister*, 449 U.S. 1 (1980),[2] this Court approved determinations of probable cause based on corroborated hearsay even though there was no indication how the hearsay informants acquired their information and the tips, therefore, violated respondents' basis of knowledge rule.

In *Jaben v. United States*, 381 U.S. 214 (1965); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Adams v. Williams*, 407 U.S. 143 (1972); and *Colorado v. Bannister*, 449 U.S. 1 (1980) this Court approved determinations of probable cause based on corroborated hearsay even though the

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[2] In *Colorado v. Bannister*, 449 U.S. 1 (1980), a police officer received a police radio dispatch that two persons of a certain description were suspected of stealing chrome lug nuts. Thereafter, the officer observed two persons in the area of the alleged theft who matched the given description and had chrome lug nuts in their car. The officer arrested the suspects and seized the lug nuts. This Court unanimously approved the search even though there was no indication, in this Court's opinion, of who the original hearsay informant was, how he acquired his information connecting the suspects with the theft, or why the arresting officer and police radio dispatcher thought he was credible. This Court held simply: "Probable cause in this case is self-evident." *Id.* at 3.

hearsay informants satisfied neither of respondents' tests for veracity and the corroborating facts were capable of innocent explanation.

These cases were correctly decided. "The rule of probable cause is a practical, nontechnical conception," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), based upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 175. Reasonable corroboration can provide just as much assurance of accuracy as the method for verification set forth in respondents' brief and often it is the only method available to law enforcement. There is no reason to exclude corroboration as a method of verifying hearsay.

Respondents' answer to all this is to argue that *Brinegar, Husty, Draper, Chambers, Jaben* and *Adams* are irrelevant because they do not involve search warrants whereas the search in the instant case was conducted pursuant to a warrant. See Respondents' Brief at 27, 30-31 n.21. The implicit premise of this argument is that searches conducted with a warrant are judged by a stricter standard of probable cause than are searches conducted without a warrant.

But this premise turns the Fourth Amendment on its head. Police are to be encouraged to procure warrants, not discouraged. This Court has declared that because of "the preference to be accorded searches under a warrant . . . in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965). See also *Jones v. United States*, 362 U.S. 257 (1960). It would be incongruous, then, to evaluate the search in the instant case by a stricter standard of probable cause than was used in *Husty, Draper, Cham-*

bers, *Adams* and *Bannister* simply because the police in this case acted pursuant to a warrant.

Respondents' attempt to distinguish the warrantless search cases founders for a second reason as well. It is well settled that "the probable cause determination [to support a warrantless search] must be based on objective facts that could justify the issuance of a warrant by a magistrate." *United States v. Ross*, 50 U.S.L.W. 4580, 4583 (June 1, 1982). If this Court adopts respondents' interpretation of *Aguilar* as the governing rule then the corroborated hearsay relied upon in *Husty*, *Draper*, *Chambers*, *Adams* and *Bannister* could *not* have justified the issuance of a warrant by a magistrate because the hearsay in each of those cases was deficient under respondents' standard. Therefore, if respondents are correct in their interpretation of the Fourth Amendment, this Court was wrong when it approved the determinations of probable cause in *Husty*, *Draper*, *Chambers*, *Adams* and *Bannister*. Respondents' interpretation of *Aguilar* should be rejected.

THIS COURT COULD REVIEW THE SEARCH IN THIS CASE UNDER THE SOLICITOR GENERAL'S INTERPRETATION OF *AGUILAR*

If this Court rejects respondents' interpretation of *Aguilar*, several choices remain. This Court could adopt the Solicitor General's interpretation of *Aguilar*, which reconciles the two prong analysis with the holdings of this Court in *Husty*, *Draper*, *Adams* and *Bannister*. Under the Solicitor General's approach, the credibility of the informant and the reliability of his information may be inferred circumstantially from the detail of his report and the nature and extent of police corroboration. Thus, for example, both prongs of *Aguilar* may be satisfied if police uncover circumstances that corrobo-

rate the tip and, though possibly innocent, are unusual and invite explanation.[3]

SEARCH WARRANT WAS VALID UNDER SOLICITOR GENERAL'S INTERPRETATION OF *AGUILAR*

Under this approach the search warrant in this case was valid. Police corroboration of the anonymous letter and the nature of Lance Gates' unusual journey to Florida were sufficiently reliable indications that the author of the letter was a credible person who had acquired accurate information in a reliable way. The search warrant affidavit therefore satisfied *Aguilar*.

It is noteworthy that respondents do not even attempt to answer the Solicitor General's brief.

THIS COURT SHOULD DISPENSE WITH THE *AGUILAR* TWO PRONG ANALYSIS AND, INSTEAD, REVIEW THE SEARCH UNDER THE *CARROLL-BRINEGAR* STANDARD

Alternatively, this Court could dispense with the *Aguilar* two prong analysis altogether and ask instead whether the facts and circumstances presented to the magistrate were sufficient to warrant a prudent person in the belief that illegal narcotics were probably present in the defendants' home and car.

---

[3] Petitioner has suggested a similar interpretation of *Aguilar* differing from that proposed by the Solicitor General in only one respect. Under the interpretation of *Aguilar* urged by petitioner, citizen-informers, that is, hearsay informants who are not paid or protected police informers, would be presumed credible. Such a presumption would help explain this Court's confidence in the previously untested citizen informers in *Jaben* and *Chambers*.

This is the test for probable cause first articulated in *Carroll v. United States*, 267 U.S. 132 (1925), wherein this Court approved the warrantless search of a car because "the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.* at 162. See, also, *Brinegar v. United States*, 338 U.S. 160 (1949).

With slight variation this same test governs arrests, see *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979), and searches pursuant to a search warrant. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). As this Court put it in *Dumbra v. United States*, 268 U.S. 435, 441 (1925); "if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

This Court has applied this same standard to review determinations of probable cause based upon hearsay evidence. In *Husty v. United States*, 282 U.S. 694 (1931), this Court approved the search of a car even though federal agents acted on the basis of an informant's tip. This Court reasoned:

> "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. . . It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched." *Id.* at 700-701.

Similarly in *Draper v. United States*, 358 U.S. 307, 311, 312 (1959) and again in *Adams v. Williams*, 407 U.S. 143, 148-149 (1972) this Court cited and applied the *Carroll-Brinegar* standard in approving determinations of probable cause based upon hearsay evidence.

These cases were correctly decided. There is no reason to abandon the *Carroll-Brinegar* standard in favor of a more *stringent* test of probable cause in cases involving hearsay. "The 'long-prevailing standards' of probable cause [embody] 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway v. New York*, 442 U.S. 200, 208 (1979) quoting in part from *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Nor is there any reason to supplement the *Carroll-Brinegar* standard with a technical rule governing the admissibility of hearsay as *Aguilar v. Texas* allegedly attempted to do. The *Carroll-Brinegar* standard already addresses the problem of hearsay. The standard instructs police and courts to give hearsay only as much weight as is prudent in the circumstances. *Jones v. United States*, 362 U.S. 257 (1960), further admonishes that it is imprudent to credit hearsay when there is substantial basis for doing so. These standards provide sufficient guidance and restraint, while at the same time allowing police "fair leeway" in enforcing the law.

Replacing these standards with a technical rule governing the admissibility of hearsay would be unwarranted and unwise. "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary

greatly in their value and reliability. One simple rule will not cover every situation." *Adams v. Williams*, 407 U.S. 143, 147 (1972). Moreover, "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

This Court properly ignored the two prong analysis and applied the *Carroll-Brinegar* standard when it approved a determination of probable cause based upon hearsay in *Adams v. Williams*. It should do so again here.

Respondents' main answer to these arguments is that the *Carroll-Brinegar* standard governs warrantless searches but a stricter standard governs searches pursuant to a warrant. This argument contravenes the "preference to be accorded warrants" and is flatly inconsistent with *Jones v. United States*, 362 U.S. 257 (1960); *Dumbra v. United States*, 268 U.S. 435 (1925); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); and *United States v. Ross*, *supra*, 50 U.S.L.W. at 4583.

SEARCH WARRANT WAS PROPERLY ISSUED UNDER *CARROLL-BRINEGAR* STANDARD

For reasons discussed in Petitioner's Opening Brief the search warrant affidavit in this case passed muster under the *Carroll-Brinegar* standard. The detail of the anonymous letter, the nature and extent of police corroboration and the nature of Lance Gates' journey to Florida and back, taken together, were sufficient to warrant a prudent person in the belief that illegal narcotics were probably present in respondents' home and car.

Respondents' answer to this argument is unusual. Respondents do not challenge petitioner's claim that the facts and circumstances presented to the magistrate, as set forth in Petitioner's Brief, were sufficient to warrant a prudent person in the belief that illegal narcotics were probably present in defendants' home and car. Instead, respondents challenge petitioner's characterization of the facts. In particular, respondents take issue with the claim that "Lance Gates" flew to Florida, as predicted by the anonymous letter. See Respondents' Brief at 5, 28.

According to respondents, all that the magistrate knew was that someone using the name Lance Gates and matching the description of Lance Gates given to police by the Illinois Secretary of State's Office boarded Eastern Airlines flight 245 bound for Florida on May 5, 1978. This is not true. The magistrate knew more. The search warrant affidavit also disclosed that a Chicago police officer determined that one L. Gates, phone number 980-8427, was registered for the Eastern flight 245 to Florida on May 5, 1978. The Security Office of Illinois Bell Telephone Company revealed that 980-8427 was a non-published phone number issued to Lance Gates at 189 B Greenway Drive, Bloomington, Illinois. The anonymous letter said that Lance Gates lives on Greenway in Bloomington and would be flying to Florida "a few days" after May 3, 1978.

The search warrant affidavit also stated that law enforcement agents in Florida saw the person who is referred to in the affidavit simply as "Lance Gates" get off Eastern flight 245 from Chicago in West Palm Beach, Florida, on May 5, 1978. Agents later saw "Gates" go from the airport to a motel room registered to one Susan Gates and, the next morning, get into a car with Illinois 1978 License RS 8437. A check of the records of the Illinois Secretary of State revealed that license RS 8437

was registered to Lance Gates. The anonymous letter predicted that Lance Gates would fly to Florida to meet his own car driven there ahead of him by his wife.

On the basis of this evidence it was reasonable for the magistrate to conclude, and it is fair to say, that Lance Gates flew to Florida as predicted by the anonymous letter.

Respondents also contend that the search warrant affidavit was constitutionally defective because it failed to exclude the possibility that the anonymous letter came from a vindictive travel agent who was playing a malicious prank, rather than from someone with intimate knowledge of the Gates' criminal enterprise. See Respondents' Brief at 22. But there is no reason why a travel agent would falsely accuse his customers of dealing drugs.

In any event, probable cause does not mean proof beyond a reasonable doubt. See *Brinegar v. United States*, 338 U.S. 160, 172-175 (1949). The possibility that the anonymous letter was the malicious prank of a vindictive travel agent, which is the only theory consistent with innocence that respondents suggest, was sufficiently improbable that it could be safely disregarded. The natural and probable inferences from the facts and circumstances presented to the magistrate were that the letter came from a credible person with reliable knowledge of the Gates' criminal activities and that Lance Gates would be bringing illegal narcotics back with him from Florida, as the letter predicted. The magistrate was entitled to draw these inferences. He had substantial basis for crediting the anonymous letter. His determination of probable cause did not violate the United States Constitution.

DECISION OF ILLINOIS SUPREME COURT WAS BASED UPON UNITED STATES CONSTITUTION AND NOT UPON ILLINOIS CONSTITUTION

Finally, respondents argue that this Court acted improvidently when it granted the State's petition for certiorari. Respondents contend that the judgment below rests upon an independent and adequate state ground, namely, Article I, Section 6 of the Illinois Constitution. In the alternative, respondents argue that the matter is sufficiently unclear that this case should be remanded to the Illinois Supreme Court to determine whether the judgment rests on state or federal law.

Petitioner respectfully disagrees. This Court acted properly when it granted the State's petition for certiorari. The Illinois Supreme Court clearly based its decision upon the two prong analysis set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964). Indeed, respondents virtually conceded as much in their brief in opposition to certiorari. Respondents never suggested, in that brief, that the judgment below rested on state law. Instead respondents asserted that:

> "The Circuit Court of DuPage County, the Illinois Appellate Court and Supreme Court of Illinois each reviewed the probable cause supportive of the search warrant utilizing the *Aguilar* and *Spinelli* standards of evaluation and found it wanting." Brief in Opposition to Petition for Writ of Certiorari at 3.

Respondents' present argument that the judgment below really rested upon the Illinois Constitution is not well taken. To support this claim, respondents quote extensively from two Illinois Appellate Court decisions, *People v. Martin*, 70 Ill.App.3d 36, 388 N.E.2d 278 (4th Dist., 1979) and *People v. Palanza*, 55 Ill.App.3d 1028, 371 N.E.2d 687 (3d Dist., 1978). But neither decision

construes the Illinois Constitution, and, in any event, the Illinois Supreme Court did not cite either *Martin* or *Palanza* in the instant case. That a state court "might have, but did not, invoke state law does not foreclose jurisdiction here." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

The Illinois Supreme Court decision in the instant case contains only one reference to Illinois law. Toward the beginning of its opinion the Illinois Supreme Court observed, "Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property." *People v. Gates*, 85 Ill.2d 376, 423 N.E.2d 887, 889 (1981). Thereafter, the Illinois Supreme Court confined its discussion to Fourth Amendment decisions of this Court, most notably *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), and cases and commentary interpreting and applying those decisions. There is no further reference to the Illinois Constitution and no statement that the search warrant was invalid under the Illinois Constitution. Rather the Illinois Supreme Court held the search warrant invalid because, in its view, the anonymous letter and corroborating evidence satisfied "neither the 'basis of knowledge' nor the 'veracity' prong of *Aguilar*." *People v. Gates, supra.* 423 N.E.2d at 893. In these circumstances, it cannot be said that the judgment below was really based on the Illinois Constitution.[4]

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[4] Thus, this case is distinguishable from *California v. Krivda*, 409 U.S. 33 (1972) where the state decision under review was based on an earlier state decision "which relied specifically upon both the state and federal provisions." *Id.* at 35.

In any event, even if the Illinois Supreme Court had said that the search warrant was invalid under Article I, Section 6 of the Illinois Constitution—which it did not—this Court would still have jurisdiction.

The Illinois Supreme Court, in an earlier, unrelated decision, has described the relevant provisions of the Illinois Constitution and the Fourth Amendment as "practically identical," see *People v. Bak*, 45 Ill.2d 140, 258 N.E.2d 341, 343 (1970), and said that "the standards for issuance of warrants are the same for both Federal and State authorities." *Id.* In the instant case, the Illinois Supreme Court analyzed the various decisions interpreting the Federal Constitution. Therefore, even if the Illinois Supreme Court had said the search warrant violated the State Constitution—which, to repeat, it did not, this would be one of these cases like *Delaware v. Prouse*, 440 U.S. 648 (1979), "where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did'." *Id.* at 643, quoting in part from *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). Therefore, this Court has jurisdiction. As in *Prouse*,

> "If the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.'" *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) quoting in part from *Missouri ex rel. Southern R.R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950).

CONCLUSION

Because of the foregoing, the decision of the Illinois Supreme Court should be reversed.

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Amicus Brief

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No. 81-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

Petitioner,

vs.

LANCE GATES AND SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE CHICAGO CRIME COMMISSION; THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC.; and THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Court, assuming *arguendo* that the evidence in this case was obtained in violation of the Fourth and Fourteenth Amendments, should apply an exception to the Fourth Amendment exclusionary rule, and approve the admission of the evidence, on the basis that the police acted in a **reasonable, good faith belief** that their conduct was proper.

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE CHICAGO CRIME COMMISSION; THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC.; and THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Tyrone C. Fahner, Attorney General, State of Illinois, Counsel for Petitioner, hereinafter called "State", and James W. Reilley, Esq., Counsel for Respondents, hereinafter called "defendants". Letters of Consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect

our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* forty-one times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE CHICAGO CRIME COMMISSION is a not-for-profit Illinois corporation that has provided, since 1919, an independent oversight of the criminal justice system in the Chicago metropolitan area. It is composed of 350 prestigious members of the business, professional and legal community, whose purpose is the improvement of the system and a better understanding of its workings by law-abiding citizens.

THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives. It seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

Amici well know the problems faced by police officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comport

with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate maze of rules applicable to arrest, search and seizure compels these individuals and organizations to speak on behalf of the law enforcement officers in this case and all those facing similar problems as they seek to carry out their sworn duty to protect life and property.

STATEMENT

This case involves evidence obtained by the police pursuant to a search warrant duly issued by a magistrate in the State of Illinois. The opinion of the Supreme Court of Illinois in this case may be found at 85 Ill. 2d 376, 423 N. E. 2d 887, ____ Ill. Dec. ____ (1981). The court held that an anonymous letter received by the police did not satisfy the two-prong test for probable cause enunciated in *Aguilar* v. *Texas,* 378 U. S. 108 (1964). It found that the "basis of knowledge" prong was not satisfied since the anonymous letter did not contain any statement showing that the information was acquired through personal or firsthand knowledge. It also found that the letter did not describe the accused's criminal activity in sufficient detail to allow an inference of personal knowledge of the informant.

In addition, the court found that there was no showing that the informant was credible, as required by the "veracity" prong of the *Aguilar* test, since the identity of the informant was not known and the informant failed to admit activities which were against his penal interest.

The Supreme Court of Illinois declined to address the question of whether the corroboration of the tip by an FBI agent cured the defect in either prong of the *Aguilar* test, stating that the corroborating "evidence" was only of innocent rather than criminal activity. The court found that such corroboration

was insufficient to support a finding of probable cause. The Illinois Appellate Court, Second District, by order, had previously affirmed the trial court's order quashing the search warrant and suppressing the evidence.

SUMMARY OF ARGUMENT

Amici contend that the application of the Fourth Amendment exclusionary rule in cases such as the instant case, where the police have acted in **objective good faith**—as evidenced by the fact that the search was conducted pursuant to a search warrant issued by an impartial magistrate—would serve no good purpose whatsoever. We believe that this case presents a timely and appropriate opportunity for the Court to adopt a good faith exception to the Fourth Amendment exclusionary rule.

ARGUMENT

I.

ASSUMING, ARGUENDO, THAT THE EVIDENCE IN THIS CASE WAS OBTAINED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS, IT SHOULD NOT BE EXCLUDED, SINCE THE POLICE ACTED IN A REASONABLE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

Amici will not reiterate at length the legal arguments made by the State of Illinois in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide.

The basic problem in this case is not the conduct of the police officers; it is the Fourth Amendment exclusionary rule. Indeed, the police officers in this case did all that they could possibly have done to effect a valid seizure of evidence—they submitted their information to an impartial magistrate who issued a facially valid search warrant. The evidence in this case was obtained pursuant to that warrant.

This Court is certainly able to take appropriate notice of the literal groundswell of discontent with the exclusionary rule that fills the pages of court proceedings, law reviews, comments, legislative reports, newspapers and the everyday speech of our people. The problem, the cause of the problem, and a reasonable solution to the problem, is best summed up by the recent recommendation of the Attorney General's Task Force on Violent Crime:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the **reasonable, good faith belief** that it was in conformity to the Fourth Amendment to the Constitution. **A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief.** We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees. Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981) (emphasis supplied).

As a way out of the intolerable morass created by the exclusionary rule, the state and federal courts have begun to construct their own remedies. Most recently the concept that a police officer's **reasonable good-faith belief** that his conduct was proper has been held to bar the application of the exclusionary rule to the evidence.

In *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980), *cert. den.*, 101 S. Ct. 946 (1981), the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a **reasonable, good-faith belief** that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7 (5th Cir. 1980) (emphasis supplied).

This exception to the exclusionary rule is strictly limited. The *Williams* Court noted that the officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure would obviously not constitute good faith. The police officer's actions are subject to an **objective test** and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d 830, 847.

The *Williams* Court noted: "It makes no sense to speak of deterring police officers who acted in the **good-faith belief** that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d 830, 842 (emphasis supplied). The court further articulated the need to apply the rule only when that application can serve its originally intended purpose, deterrence. 622 F. 2d 830, 847.

This Court itself has recognized that the deterrent effect upon police misconduct intended by the rule is significantly diminished when officers act under a valid **good-faith belief** that their actions are proper. In *Michigan* v. *Tucker*, 417 U. S. 433, 447 (1974), the Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the

> defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a great degree of care toward the rights of an accused. Where the official action was pursued in complete **good faith**, however, the deterrence rationale loses much of its force (emphasis supplied).

In a concurring opinion in *Brown* v. *Illinois*, 422 U. S. 590, 612 (1975), Mr. Justice Powell made the following observation on *Michigan* v. *Tucker:* "In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence."

Since the opinion of the Fifth Circuit Court of Appeals in *Williams*, other federal and state courts are rapidly beginning to look beyond alleged police misconduct to determine whether such misconduct was flagrant and purposeful, in which case the rule would apply as it was intended, or whether the misconduct was carried out under a genuine **objective good-faith belief** that the officer's conduct was consistent with lawful enforcement procedures, in which case the evidence would properly be admitted to assist in the determination of the guilt or innocence of the accused. *People* v. *Pierce*, 88 Ill. App. 3d 1095, 411 N. E. 2d 295, 301 (1980), is one such case. There the court stated, "... the purpose and flagrancy of the police misconduct is premier in any analysis, .." The court then considered the totality of circumstances, found that the police intrusion was minimal and not conscious or flagrant, and held that the **"reasonable and good-faith belief"** exception to the exclusionary rule fashioned by the *Williams* court would apply.

In *People* v. *Adams*, 53 N. Y. 2d 1, 422 N. E. 2d 537, 29 Cr L 2173 (1981), the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police. On the applicability of the rule to this specific situation, the Court of Appeals at 29 Cr L 2173 stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule . . . Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police, believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous.

In *Richmond* v. *Commonwealth*, ___ S. W. 2d ___ (Ky. App. 1981), Kentucky effectively joined the list of jurisdictions adopting a good faith exception to the exclusionary rule. Its Court of Appeals refused to suppress drugs whose seizure, while perhaps technically illegal, was accomplished by police officers acting reasonably and in complete good faith. The evidence in *Richmond* was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The Kentucky court stated: "We simply hold here, limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the **reasonable and good faith belief** that the conduct was legal." ___ S. W. 2d ___, ___ (emphasis supplied). *See also, Commonwealth* v. *Bradshaw*, 434 A. 2d 181 (Pa. Super. 1981).

In *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981), the Supreme Court of Louisiana held that a reviewing court evaluating a search warrant affidavit from which it was claimed material facts were omitted could use the same approach it would in dealing with a claim that certain facts included were false. In adopting this rule the court looked with favor upon the growing good faith exception to the exclusionary rule. It stated at 403 So. 2d 686:

> The exclusion of reliable evidence is too high a price to pay unless exclusion is essential to deter deliberate violations of

> constitutional rights. Further, this approach is in accordance with the growing recognition that the exclusionary rule has limited efficacy as a deterrent in situations in which officers have acted in good faith. See *United States* v. *Williams*, 622 F. 2d 830, 27 Cr. L. 3293 (5th Cir. 1980) * * *.

In *Gray* v. *State*, 436 A. 2d 1101 (Del. 1981), the Supreme Court of Delaware held that in view of the apparent good faith on the part of police officers, and the limited nature of the search made strictly in accordance with the scope of a consent to search, a 20 hour delay between the consent and a search was reasonable.

Two years ago the Court of Appeals for the Sixth Circuit held in *United States* v. *Bailey*, 628 F. 2d 938 (1980) that the police must usually obtain a warrant before installing a beeper and that the warrant must set a time limit on the beeper's use. However, in view of the deterrence rationale underlying the exclusionary rule, the U. S. District Court in Michigan for the Eastern District recently held in *United States* v. *Cassity*, ____ F. Supp. ____ (1981), that police acting before the decision in *Bailey* could have reasonably believed that such a strict warrant requirement was inapplicable to beeper installations. Therefore, since the officers in *Cassity* acted in good faith by actually securing a warrant, the District Court refused to suppress the fruit of their surveillance just because the warrant lacked the necessary termination date. The court stated:

> In this case, application of the exclusionary rule will not deter the agents who acted in good faith since *Bailey* serves that purpose, nor will it remedy the harm that has accrued to the victim of the search. * * * Neither is the integrity of this court questioned because it is not applied. The rule is fashioned by the court but its application is not mandatory where no useful purpose is served. Therefore, I decline to apply the exclusionary rule and deny defendants' motion to suppress the evidence seized as a result of the beeper monitoring. ____ F. Supp. ____, ____

In each of the foregoing cases the officers had made arrests or searches under circumstances which, strictly speaking, violated the defendants' Fourth Amendment rights, but which were made in good faith. In all of them the courts refused to suppress the evidence on the theory that since the police reasonably, albeit erroneously, believed that their conduct was proper, it would serve no deterrent purpose to exclude the evidence. Each Fourth Amendment application was made under circumstances in which the complexity of the law was such that the officers had reason to believe that they were acting properly, even though, in hindsight, it could possibly be found that they were not. The important point is that the courts found that they *were not deterred* because they believed, in **objective good faith**, that their actions were correct.

Amici submit that application of the exclusionary rule in cases such as the instant case, where the police have acted in **objective good faith**—as evidenced by the fact that the search was conducted pursuant to a search warrant issued by an impartial magistrate—would serve no good purpose whatsoever.

CONCLUSION

Amici submit that the exclusionary rule should not be applied in this case. This case presents a timely and appropriate opportunity for the Court to adopt the good faith exception to the exclusionary rule. We ask that the decision of the Supreme Court of Illinois be reversed on the facts and law, and on the basis of sound judicial policy.

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Amicus Brief

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No. 81-430

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

LANCE GATES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments require suppression of evidence seized by police relying in good faith upon a search warrant issued by a judge who reasonably, if mistakenly, concluded that the supporting affidavit furnished probable cause.

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BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

This case presents a recurrent application of the Exclusionary Rule, one which defeats the purpose of criminal trials--ascertaining truth--and

disserves an essential objective of the Fourth Amendment--encouraging resort to warrants. California's courts, like those of Illinois, feel compelled by decisions of this Court to exclude evidence seized by police acting in good faith reliance upon a search warrant issued by a magistrate who reasonably, if mistakenly, concluded that the underlying affidavit supplied probable cause. Perhaps no application of the Exclusionary Rule is more inconsistent with its announced purpose of deterring police misconduct. Perhaps no other application of the Rule so offends the public conscience as suppressing the truth because a police officer has obeyed a judge's command. Our interest in protecting the integrity of our courts and the reliability of their verdicts brings the People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

A search warrant issued by a judicial magistrate should not be vulnerable to attack on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

The present contrary rule began life as an accident, matured into an unexplained assumption, and survives as an obstacle to an essential objective of the Fourth Amendment--encouraging the use of warrants--and to the central purpose of criminal trials--ascertaining the truth. Embraced before the fundamental purpose of the Exclusionary Rule was clearly defined, the present practice is now seen as self-defeating; police are not deterred from engaging in unlawful conduct, but are instead

discouraged from doing precisely what the Constitution commands: securing a warrant from a neutral, detached magistrate.

The indiscriminate approach to suppression followed in Mapp v. Ohio (1961) 367 U.S. 643, 655, is irreconcilable with the balancing approach later adopted in Calandra v. United States (1974) 414 U.S. 338, restricting the Exclusionary Rule "to those areas where its remedial objectives are thought most efficaciously served." Id. at 348. Calandra and its progeny compel reexamination of the earlier decisions in Aguilar v. Texas (1964) 378 U.S. 108, Whiteley v. Warden (1971) 401 U.S. 560, and Giordenello v. United States (1958) 357 U.S. 480. While the results in those cases may be consistent with our proposed rule, their rationale cannot be reconciled with Calandra. Applying the reasonable, good faith standard inherent in

this Court's recent decisions, the judgment of the Supreme Court of Illinois must be reversed.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED BY POLICE ACTING IN GOOD FAITH RELIANCE UPON A WARRANT ISSUED BY A JUDGE IN THE REASONABLE, IF MISTAKEN, BELIEF THAT THE SUPPORTING AFFIDAVIT SUPPLIED PROBABLE CAUSE.

1. Introduction

Amicus challenges the existing judicial practice of suppressing evidence seized under a warrant issued without probable cause. This Court has never explained why exclusion is a relevant, much less necessary, sanction for erroneous determinations by state magistrates. To this day, Aguilar v. Texas (1964) 378 U.S. 108, is a rule without a reason. Instead, the rule followed should be:

> A search warrant issued by a judicial officer may not be attacked on

the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

This Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in Aguilar v. Texas. That decision has been widely accepted as authority for imposition of the Exclusionary Rule. See, e.g, United States v. Karathanos, 531 F.2d 26, 33, cert. denied (1966) 428 U.S. 910. In re Martinez (1970) 1 Cal.3d 641, 651 n.8, 83 Cal.Rptr. 382, 389 n.8. In fact, Aguilar did not impose the Exclusionary Rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page five of the Brief for Respondent that a Texas

statute, Article 727a, VACCP, enacted in 1925, provided:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted into evidence against the accused on the trial of any criminal case."

This Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute not constitutional compulsion. Application of the Exclusionary Rule was not before the Court, much less decided, in Aguilar.

Nevertheless, two years later the Court filed its brief per curiam order

in Riggan v. Virginia (1966) 384 U.S. 152, declaring:

> "The petition for a writ of certiorari is granted. The judgment is reversed. Aguilar v. Texas, 378 U.S. 108."[1]

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. Hall v. Commonwealth (Va. 1924) 121 S.E. 154, cited in appendix to Elkins v. United States (1960) 364 U.S. 206, 232. This Court, like the state appellate court, simply assumed that Aguilar authorized suppression. Riggan v. Commonwealth (Va. 1965) 144 S.E.2d 298, 301-302. In its pleading

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1. The Court had previously filed a similar summary reversal order in Barnes v. Texas (1965) 380 U.S. 253. In light of the Texas statute, Barnes added nothing to Aguilar.

before this Court the Commonwealth did not suggest otherwise. Thus, without argument, without a hearing, without explanation and, apparently, without consideration, Aguilar was deemed authority for a rule it did not announce.

Five years later, in Whiteley v. Warden (1971) 401 U.S. 560, a divided Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again, no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to Mapp v. Ohio (1961) 367 U.S. 643, instead of a reference to Aguilar. Since Mapp was not a warrant case, it did not add to the Court's legal reasoning.[2/]

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2. Ironically, Whiteley's author would have overruled Mapp. Coolidge v. New Hampshire (1971) 403 U.S. 443, 490 (concurring opinion of Mr. Justice Harlan).

In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the Exclusionary Rule.

Whiteley's reliance on Mapp was almost predictable since the Mapp plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at 655. As applied to warrant cases, of course, the quoted language is dictum. That the dictum was followed in Whiteley is ultimately traceable to the fact that "the discursive prevailing opinion in Mapp v. Ohio . . . does not clearly identify the primary basis for the rule. . . ." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 670 (1970).

If Aguilar was accidental, Whiteley was not. Still, Whiteley was the product

of historical chance. This Court confronted the warrant cases before it clarified the fundamental purpose of the Exclusionary Rule: deterrence of police misconduct. Had the clarification preceded the application, a different rule should have emerged. This conclusion applies with equal force to decisions suppressing the fruits of warrant searches in federal criminal prosecutions. E.g., Nathanson v. United States (1933) 290 U.S. 41; Giordenello v. United States (1958) 357 U.S. 480; Spinelli v. United States (1969) 393 U.S. 410.

Amicus submits that recent decisions of this Court refining its purpose compel reformulation of the Exclusionary Rule invoked here by the Supreme Court of the State of Illinois.

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2. Purposes of the Exclusionary Rule

A. The Personal Right Theory

Unlawfully seized evidence was first suppressed to remedy an invasion of the accused's personal Fourth Amendment right of privacy. Weeks v. United States (1914) 232 U.S. 383, 398; Connolly v. Medalie (2d Cir. 1932) 58 F.2d 629, 630. Under this theory evidentiary use of illegally seized property constituted a continuing violation of protected privacy. Bernardi, The Exclusionary Rule: Is A Good Faith Standard Needed to Preserve A Liberal Interpretation of the Fourth Amendment?, 30 De Paul L.Rev. 51, 56 (1908). Subsequently, this Court explained that

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' home

> and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." United States v. Calandra (1974) 414 U.S. 338, 347. Accord, Elkins v. United States (1960) 364 U.S. 206, 217.

Since the constitutional violation is complete at the moment of unlawful intrusion, Stone v. Powell (1976) 428 U.S. 465, 540 (dissent of White, J.), subsequent use, direct or indirect, of the products of the intrusion "work[s] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. at 354-355. Abandonment of the personal right theory by severing the remedy from the right makes possible the complete repudiation of the Exclusionary Rule. Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59

Minn. L.Rev. 251, 254, 271 (1974).

B. The Imperative of Judicial Integrity

The "imperative of judicial integrity" was the next doctrine devised to justify suppression of evidence. First styled the "clean hands" or "dirty business" doctrine, this concept originated as rhetoric inspired by the common desire of Justices Brandeis and Holmes to impose the Exclusionary Rule before accumulated experience had indicated the inadequacy of existing alternatives. Olmstead v. United States (1927) 277 U.S. 438, 470, 483-484 (dissenting opinions of Brandeis, J., and Holmes, J.). Both justices clearly identified their views as non-constitutional law, however. Id. at 466, 469-470, 479.

Thereafter, Elkins v. United States, 364 U.S. at 217, Mapp v. Ohio (1961) 367 U.S. 643, 660, and Linkletter v. Walker,

381 U.S. at 635, all contained a "ritualistic reference" to the "imperative of judicial integrity." Schrock and Welsh, 59 Minn. L.Rev. at 263.

The essence of the "imperative" has proved elusive. Sometimes couched in terms of judicial self-respect, it appears more concerned with public respect for the judiciary. Under this theory exclusion is necessary to avoid judicial complicity in unlawful police conduct. See Bernardi, 30 De Paul L.Rev. at 56-57. Acknowledged as non-constitutional law by its innovators, the doctrine has been criticized as unconstitutional by one commentator, Monaghan, The Supreme Court 1974 Term, Foreword: Constitutional Common Law, 89 Harv. L.Rev. 1, 5 (1975), and as "a bootless and rarefied essence" by others, Schrock and Welsh, 59 Minn. L.Rev. at 265.

While a rhetorical success, the judicial integrity doctrine is an analytical failure. The reason is plain: "exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214, 223 (1978). Accord, State v. Bisaccia (N.J. 1971) 279 A.2d 675, 676-677; Burger, Who Will Watch the Watchman, 14 Am. U.L.Rev. 1, 12 (1964); Thompson, The Burger Court in the California Crystal Ball, 5 S.W. U.L.Rev. 238, 240-241 (1973). Dean Barrett asks,

> "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?"

Barrett, Exclusion of Evidence Obtained by Illegal Searches - A Comment on People v. Cahan, 43 Calif. L.Rev. 565, 582 (1955). The public answers "Yes." "The solid majority of Americans rejects the idea that '[t]he criminal is to go free because the constable has blundered.'" Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027, 1035 (1974). Accord, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 927 (1973). In 1981 a national magazine poll revealed that 70 percent of those asked had little or no confidence in the ability of our courts to convict and sentence criminals. NEWSWEEK, March 23, 1981, p. 49. "[T]he prototype of these complaints is enforcement of the exclusionary rule," Professor Kaplan adds. 26 Stan. L.Rev. at 1035-1036.

The Exclusionary Rule applies notwithstanding the inadvertent or minimal nature of the police intrusion or the heinous nature of the accused's offense. "[T]his lack of proportionality," Kaplan explains, "demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Ibid. Removed from the context of egregious police misconduct the judicial integrity doctrine becomes self-defeating.

The "imperative of judicial integrity" has not been the basis for deciding cases. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 669 (1970). Despite the "imperative," defendants may be brought to trial although illegally seized outside the jurisdiction. Gerstein v. Pugh (1975) 420 U.S. 103, 119; Frisbie v.

Collins (1952) 342 U.S. 519. Their prosecutions may be initiated by indictments supported by illegally seized evidence. United States v. Calandra, 414 U.S. at 349-352. At trial, defendants may not challenge on Fourth Amendment grounds evidence that was obtained by police in violation of another's right of privacy. United States v. Salvucci (1980) 448 U.S. 83, 94; Alderman v. United States (1969) 394 U.S. 165. Nor may the accused object to evidence improperly seized by a private citizen. Burdeau v. McDowell (1921) 256 U.S. 465. Evidence indirectly derived from an unlawful search may be admissible if sufficient "attenuation" is shown, Brown v. Illinois (1975) 422 U.S. 590, and the direct fruits of the search may be used to impeach the defendant, Walder v. United States (1954) 347 U.S. 42. Even

if improperly admitted, unconstitutionally obtained evidence may be declared "harmless". Chapman v. California (1967) 386 U.S. 18. Evidence secured in violation of the Fourth Amendment may be considered for purposes of sentencing, United States v. Schipani (2d Cir. 1970), 435 F.2d 26, 28 cert. denied, 401 U.S. 983 (1971), and probation revocation, United States v. Vandemark (9th Cir. 1975) 522 F.2d 1019, 1021. Further, Fourth Amendment claims are unreviewable on habeas corpus. Stone v. Powell (1976) 428 U.S. 465; In re Sterling (1965) 63 Cal.2d 486. None of these decisions, nor those refusing to apply the Exclusionary Rule in civil proceedings, United States v. Janis (1976) 428 U.S. 433, or retroactively, Linkletter v. Walker, supra, Desist v. United States (1969) 394 U.S. 244, can be squared with the "imperative of judicial integrity."

The judicial integrity theory failed the retroactivity test. "[I]n Linkletter deterrence became the dispositive consideration in the exclusion controversy." Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & C. 343, 352 (1980). "Indeed, all of the cases since Wolf [v. Colorado (1949) 338 U.S. 25] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." Linkletter v. Walker, 381 U.S. at 636-637. The retroactivity cases taught that judicial integrity is not impaired by the introduction of evidence seized in good faith reliance on existing constitutional norms. United States v. Peltier (1976) 422 U.S. 531, 537.

The deterrence rationale did not merely eclipse the judicial integrity

theory, it absorbed it. Relegated to marginal status in Calandra, 414 U.S. at 355, n.11, the judicial integrity doctrine ceased to exist independently in Michigan v. Tucker (1974) 417 U.S. 433, 450 n.25:

> "It has been suggested that courts should exclude evidence derived from 'lawless invasions of the constitutional rights of citizens,' Terry v. Ohio, 392 U.S., at 13, in recognition of 'the imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent

basis for excluding challenged evidence."

The Court's reasoning was elaborated in United States v. Janis, 428 U.S. at 458 n.35:

> "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. See United States v. Calandra, 414 U.S. at 347, 354. The focus must therefore be on the question whether the admission of evidence encourages

> violations of the Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

See also Stone v. Powell, 428 U.S. at 485; Tisnado v. United States (9th Cir. 1976) 547 F.2d 432, 456. Just as abandonment of the personal right theory makes possible complete repudiation of the Exclusionary Rule, the decline of the judicial integrity rationale clears the way for the Rule's reform.

C. The Deterrence Rationale

The fall of the judicial integrity doctrine marked the rise of the deterrence rationale. Deterrence has now become the "sole consideration" governing this Court's suppression of evidence. Sunderland, 71 Judicature at 353. Coincidentally, the

deterrence rationale appears to have come full circle. Always concerned with discouraging "unlawful police conduct," United States v. Calandra, 414 U.S. at 347, suppression of evidence originally was intended as a substitute for punishment of the offending officer. "Deterrence" meant that the officer would not have acted as he did had he known that the courts would exclude illegally obtained evidence. The critical element was the officer's state of mind: he should have known better. Thus Elkins and Mapp spoke of "removing the incentive" to disregarding Fourth Amendment rights. 364 U.S. at 217, 222; 367 U.S. at 656. This view was a natural consequence of the fact that Mapp and Weeks v. United States (1914) 232 U.S. 383, involved flagrant Fourth Amendment violations. See Traynor, Mapp v. Ohio

at Large in the Fifty States, 1962 Duke L.J. 319, 322.

As time passed and police methods improved the Court's focus shifted from sanctioning official misconduct to giving new substantive content to the Fourth Amendment. "Deterrence" came to mean motivation of "the law enforcement profession as a whole--not the aberrant individual officer--to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." Dunaway v. New York (1979) 442 U.S. 200, 221 (concurring opinion of Stevens, J.). The Exclusionary Rule became a tool for expanding judicial review.

The broadened deterrence rationale is seriously flawed. It assumes that Fourth Amendment rules will be explicitly formulated and effectively communicated. In fact, neither condition exists.

Bernardi, 30 De Paul L.Rev. at 77 n.153. Instead, the rules governing search and seizure have been made hopelessly complex. Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L.Rev. 736, 740 (1972). Rules which cannot be understood cannot deter. Additionally, "[t]here is reason to believe that the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule." Oaks, 37 U.Chi. L.Rev. at 730. Lack of communication between police and prosecutors is aggravated by the delay endemic to the judicial process. Few officers, apprised of the reviewing court's evaluation of their actions, can remember the specific circumstances in which, long ago, they acted. Moreover, the institutional deterrence concept fails to appreciate that the exclusion sanction

is powerless to deter conduct not directed at gathering evidence. Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 Supreme Court Review 46, 54-55.

This Court recently recognized that an Exclusionary Rule disassociated from the state of mind of the acting officer does not deter. In Michigan v. Tucker (1974) 417 U.S. 433, 447, the Court said

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or in their future counterparts, a

> greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

This Court has reinstated its original concept of deterrence, one that demands a plausible causal connection between the sanction of exclusion and the future conduct of the police.

D. The Judicial Review Function

The Exclusionary Rule serves a fourth purpose: it affords judicial review of Fourth Amendment claims, thereby allowing the Court to reformulate substantive rights. Our courts have not alluded to this justification. But see United States v. Peltier, 422 U.S. at 554 (dissenting opinion of

Brennan, J.). Of course, one cannot reasonably expect a court to admit it suppresses the truth and releases criminals into society in order to provide grist for the judicial mill. Commentators have noted this function of the suppression doctrine, however. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. & C. 255, 260 (1961); La Fave, 1 Search and Seizure, A Treatise on the Fourth Amendment, 29, 33-34 (1978); Oaks, 37 U.Chi. L.Rev. at 756; Bernardi, 30 De Paul L.Rev. at 101; Sunderland, 71 Judicature at 373.

The substantive results of judicial access to the Fourth Amendment via the Exclusionary Rule have drawn mixed reviews. Professor La Fave concludes "[o]ne of the virtues of the exclusionary rule . . . is that it provides the higher courts with a sufficiently steady diet of Fourth Amendment issues to make possible

a meaningful shaping of constitutional standards governing arrest and seizure." 1 Search and Seizure at 33-34. Bernardi, on the other hand, argues that this Court has so compromised substantive privacy rights with evidentiary consequences that "the present exclusionary rule, instead of befriending the fourth amendment, may have become the primary hindrance to its liberal interpretation." 30 De Paul L.Rev. at 101. Bernardi would agree that "a remedy--restrictive result is preferable to a right--destructive result." Note, 55 Wash. L.Rev. 849, 861 (1980). To the extent that development of Fourth Amendment rights is influenced by either the distasteful consequence of suppression or by recognized limitations on the Rule's deterrent effect, e.g., Terry v. Ohio (1968) 392 U.S. 1, 12-13, Bernardi correctly concludes that the purpose

of judicial review is subverted. 30 De Paul L.Rev. at 81.

Whatever may be its substantive limitations, the Exclusionary Rule is thought to resolve two problems of judicial review: jurisdiction and incentive to litigate. Similar difficulties arise in the context of retroactivity. In Stovall v. Denno (1967) 388 U.S. 293, 306, speaking through Mr. Justice Brennan, the Court explained that "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law," disfavor purely prospective decisions.

Justice Brennan's fear, expressed in dissent in Peltier, is that a rule which

diverts judicial inquiry from the objective reasonableness of police conduct to the policeman's subjective state of mind will have the practical effects of discouraging defendants' Fourth Amendment claims and of restricting judicial attention to police motives. 422 U.S. at 554. Who will urge new law if the inevitable response must be that the challenged evidence is admissible because the officer acted in good faith reliance on old law?

A reasonable good faith standard, by retaining an objective element permits, even necessitates, judicial review. Bernardi, 30 De Paul L.Rev. at 101. "Only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at the time he acted knew or should have known that his conduct was impermissible."

Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915, 942 (1978). For example, in United States v. Calandrella (6th Cir. 1979) 605 F.2d 236, 247-252, the reviewing court first decided that a search violated the rule of United States v. Chadwick (1977) 433 U.S. 1, then held Chadwick nonretroactive.

Linkletter v. Walker (1965) 381 U.S. 618, 622 n.3, answers jurisdictional objections:

> "It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . . However, no doubt was expressed of our power in England v. Louisiana State

Board of Medical Examiners, 375 U.S. 411 (1964)."

California's former Chief Justice agrees:

> "Each part of the bifurcated decision springs from an actual controversy between the parties. . . . each part of the decision is essential to a proper resolution of the case. Neither is dictum."

Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hast. L.J. 533, 560 (1977). Accord, Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L.Rev. 201, 216-227 (1965); Beytagh, Ten Years of Non-retroactivity: A Critique and A Proposal, 61 Va. L.Rev. 1557, 1615 (1975).

Thus, a decision holding police conduct unreasonable in the constitutional sense but admitting evidence because the police acted in good faith and with a reasonable basis for the belief that their conduct was lawful does not constitute an advisory opinion forbidden by the case of controversy requirement of Article III of the federal Constitution.

The Court may feel it has presently available more cases than required to define the contours of the Fourth Amendment. See Arkansas v. Sanders (1979) 442 U.S. 753, 757. At all events, the Court need not worry about a lack of future litigants. As Justice Traynor points out, "institutional litigants with recurring interests in overturning legal rules would find incentive and reward enough" in achieving reforms regardless of whether their individual clients

directly benefitted. 28 Hast. L.J. at 547. Professor Beytagh concurs:

> "A public defender's office, for example, would have considerable incentive to seek a change in constitutional rules even though the benefit would accrue only to those involved in later cases. So would other organizations that regularly represent criminal defendants. . . . [T]he chances seem slim indeed that a constitutional issue of some importance, as to which a judge-made change in law is a reasonable possibility, will not be raised and presented effectively." 61 Va. L.Rev. at 1614.

3. Deterrence in the Balance

Assessing the deterrent effect of the Weeks rule, Mr. Justice Jackson

concluded in 1954,

> "What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. . . . The extent to which the practice was curtailed, if at all, is doubtful."

Irvine v. California (1954) 347 U.S. 128, 135 (plurality opinion).

Empirical studies conducted since support no different conclusion today. Commentators uniformly pronounce these studies "inconclusive". E.g., Oaks, 37 U.Chi. L.Rev. at 709; Sunderland, 71 J. Crim. L. & C. at 365; Bernardi, 30 De Paul L.Rev. at 75; Canon, The Exclusionary Rule: Have Critics Proven

That It Doesn't Deter Police?, 62 Judicature 398, 403 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent To Police?, 62 Judicature 404, 405 (1979). "[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." United States v. Janis, 428 U.S. at 449-450. Worse, reliable statistics do not appear to be forthcoming. Id. at 450-453.

Absent empirical evidence the Exclusionary Rule rests upon the assumption that it acts as a substantial and efficient deterrent. United States v. Janis, 428 U.S. at 453. This is a precarious perch, for the Rule's deterrent force "is not so inherently likely that we can assume it to exist in the absence

of proof." Wright, 50 Tex. L.Rev. at 741. On the contrary, the presumption of deterrence conflicts with common experience. Undeniably, the Rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Terry v. Ohio (1968) 392 U.S. 1, 14. At the same time, "No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." People v. Gurley (1972) 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419. Accord, Michigan v. Tucker (1974) 417 U.S. 433, 447. Police cannot follow rules they cannot fathom. In any event, the police officer infrequently learns that his actions have been judicially

condemned, Kaplan, 26 Stan. L.Rev. at 1032, and the sanction of suppression is indirect, Schlesinger, 62 Judicature at 408. "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics (1971) 403 U.S. 388, 416 (dissenting opinion of Burger, C. J.). Moreover, while the sanction is limited to evidence offered at trial, most cases are plea-bargained. Professor Oaks concludes: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." 37 U.Chi. L.Rev. at 755. Although statistical evidence is inconclusive there are many reasons to doubt the Rule's efficacy as an indirect deterrent.

Recognition that deterrence is a fragile assumption rather than a hard fact made all but inevitable the balancing approach adopted in United States v. Calandra (1974) 414 U.S. 338. Calandra signalled a discriminating application of the suppression doctrine that is the antithesis to Mapp:

> "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 414 U.S. at 348.

Balancing deterrence against potential damage to the role and functions of the grand jury, the Court found that "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," 414 U.S. at 351, and, therefore, refused to extend the Exclusionary Rule to grand

jury proceedings.

Following Calandra, the Court found insufficient deterrent effect to warrant extending the Exclusionary Rule to civil proceedings, United States v. Janis, 428 U.S. at 454, or to federal habeas corpus, Stone v. Powell, 428 U.S. at 487, 489-495. For the same reason the Court refused to suppress evidence seized incident to arrest pursuant to a subsequently invalidated statute, Michigan v. De Fillippo (1979) 443 U.S. 31, or evidence seized during a search conducted under long-standing judicially approved administrative regulations later held unconstitutional, United States v. Peltier, 422 U.S. at 538-542. In Michigan v. Tucker (1974) 417 U.S. 433, 446-447, deterrence was weighed and found wanting in a Fifth Amendment exclusionary context. These decisions are consistent with pre-Calandra rulings

limiting retroactive operation of new Fourth Amendment doctrine, e.g., Desist v. United States (1969) 394 U.S. 244, 254 n.24, and permitting impeachment use of illegally seized evidence, Walder v. United States (1954) 347 U.S. 62.

The reasoning of Calandra cannot be confined to considering whether to expand the scope of the Exclusionary Rule. Although each of the cited decisions refused to extend the Rule, for the same reason United States v. Salvucci (1980) 448 U.S. 83, 94-95, narrowed the Rule by overruling the "automatic standing" doctrine of Jones v. United States (1960) 362 U.S. 257. The Court's determination not to subvert the guilt determining process of a criminal trial by suppressing evidence unless "the sanction serves a valid and useful purpose," Michigan v. Tucker, 417 U.S. at 446, invites reform, not mere resistance to change. The logic

of Calandra's balancing approach leads ineluctably to the conclusion reached in United States v. Peltier, 422 U.S. at 542:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

"The Constitution does not demand judicial overkill." People v. Carnesi (1971) 16 Cal.App.3d 863, 869, 94 Cal.Rptr. 555, 558.

Calandra, Tucker, Stone, Janis, Peltier, and De Fillippo lead to the conclusion that suppression is an irrelevant sanction when evidence is acquired

pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. Indeed, one California court has reached that conclusion in dictum:

> "The rule excluding evidence obtained by unconstitutional means was developed to deter unlawful police conduct. It has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation." People v. Kirk (1974) 43 Cal.App.3d 921, 925, 117 Cal.Rptr. 345, 347. Accord, State v. Gerardo (N.J. 1969) 250 A.2d 130, 133.

Ironically, evidence is nevertheless suppressed when the police act exactly as the magistrate commands while, in various other situations,

evidence is admitted when the erring police have acted in reasonable good faith.

4. Present Acceptance of Good Faith Exceptions to Exclusionary Rule

A good faith standard already has gained limited acceptance in the form of exceptions to the present Exclusionary Rule. These exceptions fall into two general categories: "technical violations" and "good faith mistakes." Mr. Justice Powell described as "technical" Fourth Amendment violations in which "officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. . . ." Brown v. Illinois (1975) 422 U.S. 590, 611 (concurring opinion of Powell, J.) (Footnote deleted). Because suppression does not deter undesirable conduct in such cases

Justices Powell and Rehnquist would not apply the Exclusionary Rule. Id. at 612. In these circumstances suppression discourages desired police conduct.

In Michigan v. De Fillippo, the Court agreed, holding valid an arrest made in good faith reliance on a city ordinance later held unconstitutionally vague. "A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional," the Court explained. 443 U.S. at 37-38.[3/]

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3. De Fillippo creates a qualified exception. Where the statute invoked does not define a substantive criminal offense but instead expressly authorizes searches and seizures infringing Fourth Amendment rights the Court has stricken the statute rather than upheld the search. Ybarra v. Illinois (1979) 444 U.S. 85, 96 n.11; Berger v. New York (1967) 388 U.S. 41. This distinction may be explained by the requirements of judicial review. Judicial scrutiny of a statute denouncing criminal conduct is a

(Footnote continued on next page.)

Deterrence is both unlikely and undesirable. "Society would be ill served if police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." Id. at 38. Why a police officer may rely upon the consitutional validity of a legislative enactment but not upon a magistrate's assessment of constitutional sufficiency is a puzzle.

Footnote 3 continued:

necessary incident of affirming a conviction. Upholding executive actions taken under a search statute, however, effectively removes the legislation from court review. The difference between Peltier and Ybarra is that Almeida-Sanchez v. United States (1973) 413 U.S. 266, provided the Court the opportunity to invalidate the regulation under which the searching officer acted in Peltier. Having condemned the agency's regulation in Almeida-Sanchez, the Court could condone the officer's reliance in Peltier.

In warrant cases, of course, evaluation of the sufficiency of the supporting affidavit necessarily precedes inquiry into the bona fides of the magistrate or the officer.

That both questions are ultimately for judicial determination only heightens the mystery.

Just as De Fillippo and Peltier establish that law enforcement may rely upon a statute or regulation not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws," Michigan v. De Fillippo, 443 U.S. at 38, the Court's retroactivity decisions make clear that officers may rely upon judicial decisions. E.g., Fuller v. Alaska (1968) 393 U.S. 80, 81.

Why police may rely on appellate court determinations but not upon those of trial courts or magistrates also remains unclear. State courts meanwhile have shown increasing reluctance to suppress evidence seized pursuant to defective warrants supported by probable cause.

People v. Lent (N.Y. Sup.Ct. 1980) 433 N.Y.S.2d 538, upheld a search incident to an arrest pursuant to a warrant, which, unknown to the arresting officer, had been withdrawn. People v. Arnow (N.Y. Sup.Ct. 1981) 436 N.Y.S.2d 950, characterized a magistrate's failure to endorse a warrant for nighttime service as a "technical defect" not requiring exclusion of evidence. Sternberg v. Superior Court (1974) 41 Cal.App.3d 281, 115 Cal.Rptr. 893, declined to suppress evidence because a magistrate had inadvertently neglected to sign the warrant after finding probable cause. Each opinion emphasized the good faith reliance of the police.

The "good faith mistake" exception includes both reasonable mistakes of law and of fact. Mr. Justice White has articulated its rationale:

> "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future. . . ." Stone v. Powell (1976) 428 U.S. 465, 540 (dissenting opinion of White, J.).

This Court has accepted the good faith mistake of fact exception in another context. Franks v. Delaware (1978) 438 U.S. 154, limits attacks on warrant affidavits to false statements made intentionally or with reckless disregard for their truth.

Each of these good faith exceptions is

compelled by the balancing approach of Calandra. Just as the rationale of Calandra cannot be confined, these exceptions cannot be contained. In other words,

> "The decisional history of the exclusionary rule following Mapp must be seen as a gradual, yet inexorable movement towards adoption of a good faith standard to govern application of the rule." Bernardi, 30 De Paul L.Rev. at 58.

Four Justices of this Court have expressed a willingness to so modify the Exclusionary Rule. Chief Justice Burger, concurring in Stone v. Powell, 428 U.S. at 536-542, Mr. Justice White, dissenting in Stone v. Powell, 428 U.S. at 536-542, and Mr. Justice Powell, joined by Mr. Justice Rehnquist, concurring in Brown v. Illinois, 422 U.S.

at 609-612, all have supported some form of good faith test. Mr. Justice Blackmun recognized that good faith significantly reduces deterrence in United States v. Janis, 428 U.S. at 459 n.35. All subscribed to Peltier's dictum that the deterrent purpose of the Exclusionary Rule is served "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.

Since the bulwark of the Fourth Amendment is the Warrant Clause, Franks v. Delaware, 438 U.S. at 164, and "[t]he entire thrust of the exclusionary rule . . . is to encourage the use of search warrants," People v. Moore (1973) 31 Cal.App.3d 919, 927, 107 Cal.Rptr. 590, 595, it makes no sense to discourage police from seeking warrants from neutral,

detached magistrates. Who is the Aguilar rule supposed to deter? If the police have acted as they should, suppression must sanction magistrates. But there is "no evidence for the assumption that lawlessness among federal magistrates is a pervasive problem akin to police lawlessness" which inspired adoption of the Exclusionary Rule. LaFave, 1 Search and Seizure, A Treatise on the Fourth Amendment, 3 (1978), quoting Professor Phillip Johnson. The same may be said in defense of state judicial magistrates.

5. The Good Faith Exclusionary Rule as an Objective Standard

Critics of the present Exclusionary Rule recognize its "important symbolic significance," Kaplan, 26 Stan. L.Rev. at 1055, and acknowledge that it "teaches the importance attached to observing" Fourth Amendment guarantees.

Oaks, 37 U.Chi. L.Rev. at 711. Critics of proposed good faith rules fear that "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio (1964) 379 U.S. 89, 97. A good faith rule incorporating an objective element responds to both views: it reaffirms the importance of obeying the Fourth Amendment; it affords an avenue of judicial review; it avoids placing a premium on police ignorance; it averts suppressing the truth when no deterrent purpose can be served. Such a rule is offered in United States v. Peltier, 422 U.S. at 542:

> "[E]vidence obtained from a search should be suppressed only if it can be said that the law

> enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

To adopt the Peltier standard generally or to adapt it specifically to the warrant context is not to embrace the unknown. Useful guidance for applying the new rule is found in opinions elaborating the reasonable good faith defense to suits for damages under the Civil Rights Act, 42 U.S.C. § 2283. See generally, Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915 (1978). These decisions establish a qualified immunity from civil liability for reasonable, good faith actions.

> "The standard governing police conduct is composed of two

> elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (2d Cir. 1972) 456 F.2d 1339, 1348.

A belief is "reasonable" if it is "reasonable" in the tort sense, although not in the constitutional sense. Id. at 1348-1349 (concurring opinion of Lumbard, J.). This standard is consistent with the qualified immunity principles developed in Pierson v. Ray (1967) 386 U.S. 547, Scheuer v. Rhodes (1974) 416 U.S. 232, Wood v. Strickland (1975) 420 U.S. 308, and Procunier v. Navarette (1978) 434 U.S. 555. The burden of proof as to both

good faith and reasonableness is placed upon the government.

Reinforcing the objective element of the good faith defense to civil suits is the requirement that officers be aware of "settled, indisputable law" and "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. at 321-322. No less should be demanded of magistrates. Police are not expected to predict the future course of constitutional law, however. Pierson v. Ray, 386 U.S. at 557. No more should be demanded of magistrates.

> "The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some

knowledge of it." Glasson v. City of Louisville (6th Cir.) 518 F.2d 899, 910, cert. denied, 423 U.S. 930 (1975).

Consistently with this rule Peltier penalizes actions if an officer "had knowledge, or may properly be charged with knowledge," of their unconstitutionality. 422 U.S. at 542. This does not undermine the deterrent effect of the Exclusionary Rule, which depends upon police training programs. A reasonable good faith suppression standard would not discourage police legal training. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L.Rev. 1319, 1412-1413 (1975). Accord, Bernardi, 30 De Paul L.Rev. at 106. At the same time, "the good faith standard will prevent the government from choosing to violate the fourth amendment willfully whenever it is prepared to pay civil

damages as the price for securing desired evidence." Bernardi, 30 De Paul L.Rev. at 102. Cf. People v. Martin (1955) 45 Cal.2d 755, 760.

Our proposed rule governing warrant cases incorporates an objective standard. The good faith of the issuing magistrate and the executing police officer does not abrogate the Exclusionary Rule if the supporting affidavit is so lacking in the indicia of probable cause as to render official reliance upon it wholly unreasonable. The affidavits condemned in Giordenello v. United States, 357 U.S. at 481, Aguilar v. Texas, 378 U.S. at 109, and Whiteley v. Warden, 401 U.S. at 563, for example, should fail our test. On the other hand, the affidavit submitted to the Circuit Court of De Page County in this case should pass constitutional muster. See 423 N.E.2d

888-889.[4/]

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4. It is in the area of warrantless searches and seizures that the evidentiary consequences of a good faith Exclusionary Rule will be most felt. In the probable cause context "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." Brinegar v. United States (1949) 338 U.S. 160, 176. Frequent disputes between trial and appellate judges and among reviewing judges themselves as to whether probable cause existed on a given state of facts suggests that the present standard does not leave enough room for police error. Stone v. Powell, 428 U.S. at 538, 540 (dissenting opinion of White, J.). Increased police training cannot substantially decrease police misjudgments regarding probable cause because "There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances." People v. Ingle (1960) 2 Cal.Rptr. 14, 17. Accord, Go-Bart Importing Co. v. United States (1931) 282 U.S. 344, 357. The reasonable good faith test will be more tolerant of police error, particularly when officers have acted in urgent circumstances. "An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation." Whirl v. Kern (5th Cir. 1969) 407 F.2d 781, 790. Studied reflection in judicial chambers often produces a decision different from intuitive response on dangerous streets. To the extent these perspectives diverge, exclusion is unlikely to deter.

CONCLUSION

Suppression of evidence is self-defeating when the police do precisely what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," United States v. Ventresca (1965) 380 U.S. 102, 109-110, may well spring from the understood absurdity of excluding evidence not because a constable has blundered, but because a magistrate has miscalculated. State v. Lien (Minn. 1978) 265 N.W.2d 833, 840 n.1.

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The judgment of the Supreme Court of Illinois should be reversed.

DATED: March 3, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF ILLINOIS

Petitioner,

vs.

LANCE GATES, et al,

Respondent

ON PETITION FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF LAWS AT WORK (L.A.W.) JOINED BY THE STATES OF ALABAMA, ARIZONA, DELAWARE, FLORIDA, LOUISIANA, MISSOURI, NEBRASKA, NORTH CAROLINA, AND TEXAS, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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Respondent

ON PETITION FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF LAWS AT WORK (L.A.W.) JOINED BY THE STATES OF ALABAMA, ARIZONA, DELAWARE, FLORIDA, LOUISIANA, MISSOURI, NEBRASKA, NORTH CAROLINA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Honorable TYRONE C. FAHNER, Attorney General of the State of Illinois, Counsel for Petitioner and JAMES W. REILLEY, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

LAWS AT WORK (L.A.W.) is a citizen's non-profit corporation dedicated to reforming the criminal justice system to make it more responsive to the best interests of law abiding

citizens, and victims of crime. LAWS AT WORK, incorporated in 1979, evolved from Citizens for Law Enforcement Needs founded for the above-stated purpose by the late DON BELDING, DORIS DOLAN, and DR. C. ERWIN PIPER in 1966.

For more than fifteen (15) years, LAWS AT WORK has been under the direction of Doris Dolan. Its members are active participants in state and national criminal justice activities, public and private. In addition, its members have presented research upon request, before governmental committees and fact-finding commissions, the most recent being the Attorney General's Task Force on Violent Crime (1981) to provide the vital input of the citizen's point-of-view on the crime problem in our society.

As a non-profit citizens corporation, it has taken seriously the charge given to it by the then Governor Ronald Reagan, in 1973, when he served as the Honorary Chairman of California Conference on the Judiciary sponsored by Citizens for Law Enforcement Needs (now evolved into L.A.W.) saying:

> "Last year you established an important precedent by being the first to pursue court reform on an organized basis pursuant to a challenge by the Chief Justice of the United States, Warren Burger. And it was an impressive precedent! Your report and recommendations have received widespread national publicity and acclaim . . .
>
> "Part of its greatness comes from the fact that this Conference was initiated by interested citizens not involved in the judicial system . . . Volunteer citizens intermeshed with government can produce something of which we can all be proud.
>
> "Now, the question is, 'How do we implement these recommendations?' "

In three of these several Conferences on the Judiciary, due emphasis was given to the exclusionary rule. The Hon. Herbert L. Ashby, Chairman of the Exclusionary Task Force Committee Report (1972) stated:

> "The exclusionary rule was originally adopted on the assumption that no other sanction could effectively deter unlawful search and seizure. Several decades of experience now demonstrate that the exclusionary rule is ineffective and, in fact, causes more problems than it solves. It has resulted in court congestion, unnecessary delay pending judicial resolution of this issue, multitudinous appeals, an excessive number of reversals on a very technical basis having nothing whatsoever to do with guilt or innocence, a general frustration of justice and a diminution of public confidence in the criminal justice system. To the layman, it is nothing more than gamesmanship."

The Hon. Roy L. Herndon, Chairman of the Exclusionary Rule Task Force Committee Report (1973), stated:

> "The prime objective of the criminal justice system is the ascertainment of truth. It is rather startling (and generally unexplainable to the average citizen) therefore, to encounter so many roadblocks in the path of justice. Nothing, in the history of American jurisprudence, has had a more devastating effect upon the goal of *Truth in Trial* or released more obviously guilty defendants than the judge-made rule of law . . ."
>
> This Rule, as it has been extended and applied especially by the Supreme Court of California, dictates the suppression of the incriminating evidence even in cases where it is unquestionable that the police officers have acted in good faith and with every reason to believe that their procedures were not only lawful and reasonable *but required as a matter of duty under prevailing law. . . .*"

The Hon. Lynn D. Compton, Chairman of The Exclusionary Rule (1974) A Special Advisory Committee Report to the California Conference on the Judiciary, stated:

> "The National Advisory Commission (Courts Section, Criminal Justice Standard and Goals) recommends that the rule be studied with an eye toward modification or repeal. In response to this recommendation, a special committee of this Conference was assigned the task of further review. The initial thrust of the exclusionary rule was designed to encourage law enforcement agents to seek search warrants prior to conducting a search or seizure. Yet the courts have now turned their attention to search warrants to the end that hypertechnical and distorted decisions are now resulting in the suppressing of evidence even though the police have done exactly what they thought the courts required."

David L. Armstrong is President of the National District Attorneys Association which is the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity in the courts carries out its guiding purpose since its founding in 1950, of reforming the criminal justice system for the benefit of all citizens, in particular the law-abiding and those who are the innocent victims of crime.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts, as stated in the opinion of the Supreme Court of the State of Illinois, are as follows:

> "On May 3, 1978, the Bloomingdale Police Department received, by mail, an anonymous hand-written letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

'This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Road, in the condominiums. Most of their buys are done in Florida. Sue, his wife, drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys (sic) down and drives it back. Sue flys (sic) back after she drops the car off in Florida. May 3rd she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back, he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their house.

They brag about the fact that they never have to work, and make their entire living on pushers. I guarantee (sic) if you watch them carefully you'll make a big catch. They are friends with some big drug dealers who visit their house often. Lance and Sue Gates, Greenway in condominiums.'

The chief of police delivered the letter to Charles Mader, a detective in the Bloomingdale Police Department and he requested one of the department's radio operators to seek assistance from the secretary of state's office in Springfield in obtaining a specific address for the Gates. That office advised that an Illinois driver license had been issued to Lance Gates residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had, he claimed, provided reliable information to Mader during the previous two years.

Upon examining certain financial records to which the informant had access, he reported a new address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the secretary of state's office.

Upon inquiry, Mader was told by an officer of the Chicago Police Department, assigned to O'Hare Airport, that L. Gates had made a reservation with Eastern Airlines on its Flight 245, which was to depart from O'Hare on May 5th at 4:15 p.m. The final destination of the flight was West Palm Beach, Florida.

On May 5th, Mader was told by William Morely an agent of the drug enforcement administration, that 'Lance Gates' had boarded Eastern Airlines flight 245 bound for Florida. The following day, Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told him he had observed Gates and an unidentified woman leave the room at 7:00 a.m. and enter a red-vinyl-over-gray Mercury with a 1978 Illinois license number RS8437. Records at the secretary of state's office showed that the license plate was registered to Lance B. Gates, but had been issued to a different automobile.

Based on the anonymous letter, the described information obtained from the law enforcement authorities, and the verification of the address obtained from the confidential informant, Mader, on May 6, sought and obtained in the Circuit Court of DuPage County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving from Florida.

At 5:15 a.m. on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by awaiting Bloomingdale Police Officers. In the trunk of the Mercury, the officers found several large bundles of marijuana, weighing approximately three hundred fifty (350) pounds. The search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weigh-

ing the drugs. Police also ascertained that the couple had cocaine in their possession.

They were indicted for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm. The defendants made a pretrial motion to quash the search warrant and to suppress all physical evidence obtained as a result of the search, arguing that the anonymous letter did not set forth the underlying circumstances or manner in which the informant acquired the information or that the information was reliable as required under the test for probable cause described in *Aguilar v. Texas* (1974) 378 U.S. 108, 84 Sup. Ct. 1509, 12 L.Ed.2d 723. The defendants also argued that the separate evidence obtained by Detective Mader in his independent investigation did not corroborate the anonymous informant's accusation that the Gates were involved in criminal activity so as to support the issuance of the search warrant based on probable cause."

The motions to quash and suppress evidence were granted by the Circuit Court of DuPage County, and its action was affirmed by the Appellate Court in Illinois. The Supreme Court granted the State of Illinois petition for leave to appeal and, in a divided opinion, affirmed the action taken by the Circuit Court of DuPage County. From that opinion, the State of Illinois sought a Writ of Certiorari, which was granted on February 6, 1982.

ARGUMENT

I

AMICUS SUBMITS THAT IN THE CASE AT BAR, BOTH PRONGS OF THE AGUILAR TEST WERE SATISFIED

This Court, in *Spinelli v. United States* 393 U.S. 410, 417 (1969), in discussing its earlier opinion in *Draper v. United States* 358 U.S. 307 (1959), recognized that a magistrate

confronted with detailed corroboration could reasonably infer that an informant had gained his information in a reliable way.

In our case, as in *Draper,* supra, the government's informer did not state the way in which he had obtained his information. However, here the information was both detailed and the detail was corroborated by independent police investigation. Here, as in *Draper,* the magistrate, when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way. The extent of that corroboration is fully stated in the dissenting opinion of Justice Thomas J. Moore in the court below and is not repeated here.

In our case, the second prong of *Aguilar* is satisfied by corroboration pointing to criminality. This court in *Aguilar* mandated that some of the underlying circumstances from which an officer concluded that an informant, whose identity need not be disclosed, was credible or his information reliable, must be provided to the magistrate in the affidavit in support of a warrant. This court, in *Spinelli,* concluded that telephone company records used in that case for the purpose of corroborating the informant, ". . . contained no suggestion of criminal conduct when taken by themselves . . ."

Here, in contrast, the corroborating information does contain a suggestion of criminal conduct. In this case, we are dealing with a thirty-seven (37) hour trip from Illinois to Florida and back. Florida is a commonly known distribution center for narcotics. Lance Gates did not accompany his wife, Susan Gates, when she drove the car to Florida, but instead flew to Florida on his own, and returned from Florida driving a vehicle with plates that were registered to a different automobile. The apparent need to have the automobile in Florida for a short trip from Illinois, coupled with the apparent attempt to confuse the identity of the automobile, suggest a criminal purpose apart from the information provided by the informant.

II

THE EXCLUSIONARY RULE DOES NOT COMPEL SUPPRESSION OF EVIDENCE SEIZED UNDER A SEARCH WARRANT ISSUED BY A MAGISTRATE WHO HAS MISTAKENLY, BUT IN GOOD FAITH, CONCLUDED THAT THE SUPPORTING AFFIDAVIT FURNISHED PROBABLE CAUSE

The fundamental purpose of the exclusionary rule is to deter police misconduct. Although earlier cases suggested that the imperative of judicial integrity was an added justification for the rule, for good reason, that concept has of late been submerged within the deterrent rationale. This court, in *United States v. Janis* 428 U.S. 433 (1976), at 458, stated:

> "The primary meaning of 'judicial integrity' in the context of evidentary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate and the violation is complete by the time the evidence is presented to the court."

The judicial integrity rationale is flawed for several reasons. First, the court which excludes evidence to condemn police misconduct appears to condone the acts of the criminal. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Cal. Law Rev. 565, 582 (1975), and second, the disparity in particular cases between the magnitude of the police error and the gravity of the unpunished crime deeply offends the public sense of justice in proportionality. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford Law Rev. 1027, 1036 (1974); see also Schrock and Welsh, *Up From Calandra:* The Exclusionary Rule, 59 Minn. Law Rev. 251, 265 (1974).

The exclusionary rule is not itself a requirement of the Constitution and this Court has restricted the rule so that it is not coextensive with the Fourth Amendment. See *United States v. Williams* 622 F.2d 830, 842 (Fifth Circuit, 1980) and

the cases cited therein. In view of its deterrent purpose, the rule should not be applied in those contexts where it does not effectively deter police misconduct.

The limited purpose of the rule has prompted several Justices of this Court to suggest an exception to the exclusionary rule when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief. Stone v. Powell 428 U.S. 465, 498 (1976) (concurring opinion of Burger C.J.) Brown v. Illinois 422 U.S. 590, 611-612 (1975) (concurring opinion of Powell and Rehnquist, J.J.)

A majority of the Justices of the Fifth Circuit have concluded that the reasonable, good faith test is an exception to the exclusionary rule. *United States v. Williams,* 622 F.2d 830,846 Fifth Circuit, (1980) cert denied 449 U.S. 1127, (1981). The purpose of the exclusionary rule is not served where the police have acted reasonably and in good faith.

The exception suggested in Williams is particularly appropriate where a warrant has been sought. c.f. *Stone v. Powell* 428 U.S. 465, 537-538 (1976) (dissenting opinion of White, J.). From a police officer's perspective, two types of good faith violations are possible. In the first type, the officer may misinterpret the facts available to him and then conduct a search without a legally sufficient basis or without a warrant. In the second situation an officer may act in reliance on a statute, a warrant, or a precedent that later is invalidated. See William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Georgetown Law Journal 1361, at 1412 (1981). As to this second type of violation, Justice Powell in his concurring opinion in *Brown v. Illinois,* supra, referred to these violations as technical. As to this second category of technical violations, this Court has already addressed the question of whether good faith arrests pursuant to a statute subsequently declared unconstitutional ought to invoke the exclusionary rule. In *Michigan v. DeFillippo* 443 U.S. 31, 38 (1979), the Court held that where the officer who arrested defendants had probable cause to believe

that defendant's conduct violated a presumptively valid city ordinance, the arrest of defendant was lawful even though the city ordinance was later declared unconstitutional. A search pursuant to that arrest was held permissible and the evidence found admissible. Similarly, in *United States v. Peltier* 422 U.S. 531 (1975), this Court admitted evidence seized in a good faith border search without a warrant under a statutory construction that was subsequently held unconstitutional. In so doing, this Court stated,

> "(e)vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." id at 542.

In both cases cited above, the exclusionary rule could not reasonably be expected to exert a deterrent effect on police misconduct.

It is respectfully submitted that an even more compelling case for a good faith exception to the exclusionary rule arises when an officer seeks and obtains a search warrant. A search conducted in accordance with the terms of a search warrant implies good faith, unless the police misrepresent the facts to the magistrate in order to obtain the warrant.

> "When the police have dutifully applied to a judge or a magistrate for a search warrant and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct . . . . thus, it makes sense to retain the exclusionary rule only for warrantless searches and those searches made on the authority of warrants based on perjured testimony or on evidence so scant that no reasonable magistrate could have believed it."
>
> William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Georgetown Law Journal 1361, 1412 (1981).

It is respectfully submitted that exclusion is an irrelevant sanction when evidence is acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free from material misrepresentation. We would submit that there is no compelling reason why a police officer may rely upon the constitutional validity of a legislative enactment but not upon a magistrate's determination of constitutional sufficiency.

CONCLUSION

For the stated reason, the Judgment of the Supreme Court of Illinois should be reversed with directions.

DATED: February 12, 1982

Respectfully submitted,

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LAWS AT WORK has been authorized by the Attorneys General of the following states and the President of the National District Attorneys Association to list them as joining with us in the amicus curiae brief on the merits.

Honorable Charles A. Graddick	Alabama
Honorable Robert K. Corbin	Arizona
Honorable Richard S. Gebelein	Delaware
Honorable Jim Smith	Florida
Honorable William J. Guste, Jr.	Louisiana
Honorable John D. Ashcroft	Missouri
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Amicus Brief for the United States

Supreme Court, U.S.
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No. 81-430

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS, PETITIONER

v.

LANCE GATES, ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Illinois Supreme Court correctly ordered the suppression of evidence seized pursuant to a warrant search on the ground that the supporting affidavit, consisting of information provided by an anonymous informant and the results of police surveillance substantially corroborating most of the information provided by the informant, did not establish probable cause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents an important question concerning the standards for determining whether probable cause exists when an anonymous informant's tip is substantially corroborated by police investigation. Although this is a state prosecution, this question also arises frequently in federal cases and has received inconsistent treatment in the federal courts of appeals. Accordingly, the United States has a direct and significant interest in the standard applicable to such cases.

STATEMENT

1. On May 3, 1978, the police department of Bloomingdale, Illinois, received an anonymous handwritten letter alleging that the respondents, who are husband and wife, were engaged in drug trafficking. The letter asserted that respondent Susan Gates would be driving to Florida on May 3 and that respondent Lance Gates would be driving the car back to Illinois a few days later loaded with drugs. The full text of the letter read as follows (Pet. App. 1a, 1b-2b):

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys [*sic*] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarentee [*sic*] if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.
>
> Lance & Sue Gates
> Greenway
> in Condominiums

The chief of police gave the letter to Detective Charles Mader, and he proceeded to investigate the allegations contained in it. Detective Mader contacted the office of the Illinois Secretary of State to determine whether that office had any drivers' license record showing an address for respondent Lance Gates in Bloomingdale. That office responded that a Lance B. Gates had been issued an Illinois drivers license that listed his address as 209 D. Dartmouth Drive, Bloomingdale, Iliinois. The Secretary of State's office also furnished a physical description of Gates (Pet. App. 2a, 2b, 10b). Detective Mader then contacted a reliable confidential informant who told him, on the basis of certain financial records available to the informant, that Lance B. Gates currently resided at 198 B. Greenway Drive in Bloomingdale.[1] The informant added that Gates previously had lived at 209 D. Dartmouth Drive, Bloomingdale (*id.* at 2a, 2b-3b, 10b).

Also on May 3, 1978, Detective Mader contacted Chicago Police Officer Ott at O'Hare Airport. After checking the flight information available to him, Officer Ott informed Mader that "L. Gates" had made a reservation on Eastern Airlines flight number 245, scheduled to depart O'Hare at 4:15 p.m. on May 5, 1978. The final destination of the flight was West Palm Beach, Florida. Officer Ott also told Detective Mader that the call-back telephone number left with the reservation was 980-8427, which Detective Mader was able to confirm as the unlisted number of Lance Gates on Greenway Drive (Pet. App. 2a, 3b, 11b).

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[1] As Detective Mader explained in the search warrant affidavit, he had known the confidential informant for the previous two years, during which time the informant had provided him with information several dozen times, resulting in seven arrests and seven convictions (Pet. App. 2b-3b, 10b).

On May 5, 1978, Agent William Morely of the Drug Enforcement Administration informed Detective Mader that, pursuant to Detective Mader's instructions, he had observed all passengers boarding Eastern Airlines flight 245 and that an individual using the name Lance Gates and matching the physical description furnished by the Secretary of State had boarded the airplane (*id.* at 2a, 3b, 11b).

The following day, Agent Morely again contacted Detective Mader and told him that DEA agents had just completed a surveillance of Lance Gates in West Palm Beach. The agents observed Gates arrive at the West Palm Beach airport on May 5 and remain there for an hour before taking a taxi to the West Palm Beach Holiday Inn. Lance Gates then entered a room registered to Susan Gates. At 7 a.m. on May 6, 1978, Lance Gates and a woman left the Holiday Inn room, entered a Mercury automobile bearing Illinois license number RS 8437, and headed north on the interstate highway on the route that would be used to go to the Chicago area (Pet. App. 2a, 3b-4b, 11b-12b). Agent Morely also told Detective Mader that a check of Illinois records had revealed that the observed license plate number was registered to Lance B. Gates for a different car, a 1975 Hornet station wagon, and that the driving time from West Palm Beach to Bloomingdale was approximately 21-23 hours (*id.* at 2a, 4b, 12b).

That same day, Detective Mader applied for a search warrant from an associate judge of the circuit court of DuPage County, Illinois. The warrant application was supported by an affidavit signed by Detective Mader reciting all the facts set forth above, as well as copies of the anonymous letter, the envelope in which it was mailed, and the response of the

Illinois Secretary of State.[2] The judge issued a search warrant authorizing the police to search respondents, their condominium apartment in Bloomingdale, and the Mercury automobile (Pet. App. 2a-3a, 4b).

On May 7, 1978, at 5:15 a.m., respondents arrived at their residence in Bloomingdale. They were served with the search warrant by waiting Bloomingdale police officers. A search of the trunk of the Mercury revealed several large bundles of marijuana weighing a total of approximately 350 pounds. A subsequent search of respondents' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales used for weighing drugs. The police also ascertained that respondents had cocaine in their possession. Both respondents were indicted on state marijuana posesssion charges and respondent Lance Gates was indicted separately for possession of an unlicensed firearm (Pet. App. 3a).

2. Prior to trial, respondents filed a motion to quash the search warrant and to suppress all evidence obtained as a result of the searches, arguing that Detective Mader's affidavit did not set forth sufficient facts to support the associate judge's finding of probable cause to issue the warrant. The trial court, the circuit court of DuPage County, ordered the evidence suppressed (Pet. App. 3a). The State appealed, and the Appellate Court of Illinois, Second District, affirmed the trial court's suppression order (Pet. App. 1b-9b). The appellate court stated that this Court's decision in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), established a two-pronged test for determining whether an affidavit that relies on an informant's testimony supplies probable cause: (1) the

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[2] The affidavit is reprinted at Pet. App. 10b-12b.

"basis of knowledge" prong requires the magistrate to assess the informant's own basis for the accusation of criminal activity; (2) the "veracity" prong requires the magistrate to assess the affiant's basis for concluding that the informant's tip is trustworthy (Pet. App. 5b-6b). The appellate court pointed out that the informant's letter did not state the basis for his knowledge (*id.* at 6b). Relying on *Stanley* v. *State*, 19 Md. App. 507, 313 A.2d 847 (1974), the court then held that no degree of police corroboration of details of the tip could satisfy the "basis of knowledge" prong by showing that the informant "obtained his information in a reliable way" (Pet. App. 7b-8b). Accordingly, the court concluded that the affidavit did not satisfy the first prong of the *Aguilar* test (*id.* at 8b).

A divided Supreme Court of Illinois affirmed (Pet. App. 1a-18a). The majority noted the appellate court's ruling that police corroboration of a significant part of the informant's tip could never satisfy a defect in the "basis of knowledge" prong of *Aguilar* (*id.* at 11a-12a). However, the majority found it unnecessary to reach this question because it found that "the corroborative evidence here was only of clearly innocent activity" and thus could satisfy "neither the 'basis of knowledge' nor the 'veracity' prong of *Aguilar*" (*id.* at 12a).

Justices Moran and Underwood dissented (Pet. App. 12a-18a). Noting that the facts in this case closely resembled those in *Draper* v. *United States*, 358 U.S. 307 (1959), where this Court found that an informant's tip together with police corroboration of innocent details of that tip established probable cause, the dissenters stated that here the specific, detailed information in the letter combined with the

police corroboration of much of that information was enough to satisfy both prongs of the *Aguilar* test.

SUMMARY OF ARGUMENT

A. Although the informant's tip in this case, standing alone, did not meet the two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), when considered in conjunction with the corroborative information obtained by police surveillance it established probable cause for the issuance of the search warrant. The Illinois Supreme Court erroneously found that the corroboration was insufficient to support a finding of probable cause because only "innocent activity" was observed. Because the probable cause standard requires only a probability of criminal activity, however, it is manifest that the fact that observed activity is consistent with innocence does not negate a finding of probable cause. Nor is it necessary that the particular information in the tip that is corroborated by police observation meet the probable cause standard standing alone. Such a rule would completely ignore the existence of the tip, but this Court has made clear that a tip that fails to meet the *Aguilar* standard is still a proper ingredient in the probable cause determination if combined with police corroboration. *Spinelli* v. *United States*, 393 U.S. 410, 415 (1969).

The approach of the Illinois Supreme Court is flatly inconsistent with this Court's decision in *Draper* v. *United States*, 358 U.S. 307 (1959). In *Draper*, the Court found that police corroboration of details supplied by an informant, in conjunction with the informant's accusation that the suspect was carrying narcotics, established probable cause even though the conduct observed by the police was completely in-

nocuous—the suspect was observed alighting from a train dressed exactly as described by the informant. In this respect, this case is actually much stronger than *Draper*, because here the information corroborated by police surveillance was suspicious in itself. Lance Gates was observed flying down to Florida one afternoon and driving back to Chicago the next morning, as predicted by the informant. While this unusual behavior did not necessarily indicate criminal activity, it did fit a pattern for drug distribution activities and thus further increased the likelihood that the informant's accusation was true. This corroboration, together with the tip, plainly was sufficient to support a finding of probable cause.

The Illinois Appellate Court recognized that the corroboration here was relevant to the probable cause determination, but it held that corroboration could be used to remedy a defect only in the "veracity prong" of the *Aguilar* test; because it believed that the tip here failed to satisfy the "basis of knowledge prong" of *Aguilar*, the court held that corroboration of the tip could not possibly establish probable cause. This holding is erroneous on two counts. First, it is established that the "basis of knowledge prong" can be satisfied by "self-verifying detail." See *Spinelli* v. *United States*, *supra*, 393 U.S. at 416. Here, the detailed description given by the informant of respondents' modus operandi indicated that he gained his information in a reliable manner, and thus the "basis of knowledge prong" was satisfied even without corroboration.

More important, there is no basis for the court's distinction between the two prongs of the *Aguilar* test with respect to the use of corroboration. *Draper*, which involved an informant known to be reliable, demonstrates that corroboration can remedy a de-

fect in the "basis of knowledge prong," and other decisions of this Court confirm that view. Indeed, the rule advanced by the Illinois Appellate Court is quite perverse in that it permits the "basis of knowledge prong" to be satisfied by uncorroborated detail but not by independent corroboration of details supplied by the informant.

The ultimate question for the magistrate is always whether a reasonable person would conclude from the facts presented in the affidavit that probable cause exists. When the affidavit includes hearsay information, the magistrate must determine whether there is a "substantial basis for crediting the hearsay." *Jones* v. *United States*, 362 U.S. 257, 269 (1960). *Aguilar* establishes a specific framework for this determination when the affidavit is based solely on hearsay. Outside of that particular context, however —for example when independent investigation partially corroborates the tip—the *Aguilar* test should not be applied rigidly. Corroboration may well establish the reliability of the tip far better than could a statement of the informant's "basis of knowledge." Indeed, in the case of anonymous tips, where the informant cannot be questioned about the source of his information, corroboration is the only means available to establish probable cause.

The proper test for assessing the corroboration of a tip is that set forth in *Spinelli* v. *United States*, *supra*, 393 U.S. at 415: Is the tip together with the corroboration as trustworthy as a tip that meets the *Aguilar* test standing alone? This test applies whether or not the tip standing alone satisfies the "basis of knowledge prong." On the facts here, the extensive corroboration of the informant's description of respondents' modus operandi meets this test.

B. The courts below also erred in failing to consider the fact that the search here was conducted pursuant to a warrant. A judicial officer's determination of probable cause in issuing a warrant is entitled to "great deference." *Spinelli* v. *United States, supra,* 393 U.S. at 419. Thus, cases where the question of probable cause is a marginal one should be resolved by upholding the magistrate's finding. *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965). Moreover, suppression in a case like this one does not advance the purposes of the exclusionary rule. The police here acted in exemplary fashion at all times and conducted the search in good faith in reliance on the warrant issued by a neutral judicial officer. Obviously, in the absence of any official misconduct, suppression here can have no beneficial deterrent effect. If anything, it could have the deleterious effect of tending to discourage police officers from submitting their evidence to a judicial officer before acting.

ARGUMENT

A. The Informant's Tip, Together With Police Corroboration Of Details Of The Tip, Established Probable Cause

In *Aguilar* v. *Texas,* 378 U.S. 108 (1964), this Court established a two-pronged test for determining whether an affidavit based solely on an informant's tip provides probable cause to believe that an individual is engaged in criminal activity so as to support the issuance of a search warrant. The Court held that, in assessing an affidavit based on hearsay information, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying cir-

cumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.'" 378 U.S. at 114. The two aspects of this test are often referred to as the "basis of knowledge prong" and the "veracity prong" respectively. See Pet. App. 5a-6a.

Even though an informant's tip, standing alone, does not satisfy the *Aguilar* test, it does not necessarily follow that an affidavit relying in significant part on that tip cannot establish probable cause. "[W]here the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone" (*Whiteley* v. *Warden*, 401 U.S. 560, 567 (1971)), and the same is true, of course, of a finding of probable cause for the issuance of a search warrant. Thus, in *Draper* v. *United States*, 358 U.S. 307 (1959), an informant told the police that Draper would arrive from Chicago carrying narcotics on either of two days, and he gave a detailed description of Draper, the clothes he would be wearing, and the briefcase he would be carrying. When the police observed Draper alight from a train on the second day wearing clothes and carrying a briefcase that matched the information in the tip, the Court held that there existed probable cause to arrest. 358 U.S. at 313-314. In *Spinelli* v. *United States*, 393 U.S. 410 (1969), the Court considered whether a tip that satisfied neither prong of the *Aguilar* test constituted probable cause when considered in conjunction with certain information obtained by the police. In finding that probable cause was lacking, the Court identified the relevant inquiry in such a case (393 U.S. at 415): "[The magistrate] must ask: Can it fairly be said that the tip,

even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration?"

1. ***Probable Cause May be Established by Corroboration of "Innocent Details" of a Tip That Do Not Necessarily Indicate Criminal Activity***

The Illinois Supreme Court found here that the extensive police corroboration of the information contained in the informant's letter could not remedy the failure of the tip to meet the *Aguilar* test. The court stated that the police corroborated only respondents' address, Lance Gates's flight to Florida, his entry into a hotel room registered to his wife, and his leaving the hotel the next morning by car. Because this was all "innocent activity," the court held that it was "insufficient to support a finding of probable cause" (Pet. App. 12a). This conclusion is an erroneous statement of the law that rests on a misperception of the probable cause standard and the weight that partial corroboration can lend to an informant's accusation of criminal activity.

It is axiomatic that the probable cause standard is satisfied by evidence that falls short of establishing an individual's culpability. "Only a probability of criminal activity is necessary for there to be probable cause." *United States* v. *Gimelstob*, 475 F.2d 157, 160 (3d Cir.), cert. denied, 414 U.S. 828 (1973). See generally *Adams* v. *Williams*, 407 U.S. 143, 148-149 (1972); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). Thus, the fact that the police investigation corroborated only innocent activity, *i.e.*, activity that was not inherently criminal, is not inconsistent with the existence of probable cause.

It is possible that the Illinois Supreme Court did not intend to suggest that activity consistent with innocence could never support a finding of probable cause; rather, its statement about innocent activity could be read to state only that the activity observed by the police here was probably innocent and hence the affidavit did not establish probable cause. That statement, however, would also be erroneous. The fact that the information observed by the police, standing alone, does not amount to probable cause cannot automatically mean that the affidavit as a whole necessarily falls short of establishing probable cause. If it did, the result would be that the receipt of the tip is a factor that is to be completely ignored. But this Court has specifically rejected the notion that an informant's tip that fails to meet the *Aguilar* test plays no part in the probable cause determination. As explained above (pages 11-12, *supra*), *Spinelli* v. *United States*, *supra*, 393 U.S. at 415, holds that a tip combined with the results of police investigation that corroborates information contained in the tip can establish probable cause if the tip, coupled with the corroboration, is as trustworthy as an uncorroborated tip that meets the *Aguilar* test.

The error of the Illinois Supreme Court's approach is demonstrated by this Court's decision in *Draper* v. *United States*, *supra*. In *Draper*, an informant stated that Draper would be carrying narcotics when he arrived on one of two trains. The police observed Draper alight from one of the specified trains, and the informant's description of Draper and his clothes matched perfectly. In the absence of the tip, however, the police observed no more than a man getting off a train carrying a briefcase—more innocent behavior could hardly be imagined. Nonetheless, this

Court held that the tip, in conjunction with the police corroboration of innocent details of the tip, established probable cause, and, indeed, the Court has subsequently reaffirmed that the corroboration in *Draper* made it "perfectly clear that probable cause had been established." *Spinelli* v. *United States*, *supra*, 393 U.S. at 418. In short, the fact that the particular activities observed by the police do not alone establish probable cause or are not themselves inherently suspicious does not mean that those observations may not establish probable cause in conjunction with an informant's tip that they corroborate.[3]

Finally, the Illinois Supreme Court's characterization of respondents' conduct here as "clearly innocent" is questionable. In fact, the behavior observed by the police was quite suspicious, and, as such, it lends further weight to the informant's tip than would corroboration of ordinary details of everyday life. See 1 W. LaFave, *Search and Seizure* § 3.3, at 557 (1978). See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 35-36 (1963). Lance Gates flew down from Chicago to Florida late one afternoon, went to a hotel, and then arose early the next morning and commenced a 22-hour drive back to Chicago in a car with his Illinois license plate. While this unusual behavior did not necessarily indicate criminal activity, it did fit a pattern for drug distribution activities and thus was in-

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[3] This Court has pointed out that conduct that appears wholly innocent on its face may indicate criminal activity to a trained and experienced law enforcement officer. *United States* v. *Mendenhall*, 446 U.S. 544, 563 (1980) (Powell, J., concurring); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979). By the same token, conduct that appears innocent on its face may indicate criminal activity when considered in conjunction with additional information supplied to the police by an informant.

herently suspicious in a way that the observed behavior in *Draper* was not.[4] As one commentator has explained, "[f]or corroboration to be incriminating rather than innocent, it is not necessary that the events observed by the police supply probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are 'unusual and inviting explanation,' though 'as consistent with innocent as with criminal activity.'" 1 W. LaFave, *supra*, at 557, quoting *State* v. *Alaimo*, 34 N.Y.2d 187, 189, 313 N.E.2d 55, 56 (1974). The police observation of respondents' suspicious activities, which matched the informant's description of their modus operandi for acquiring illicit drugs, surely was sufficient to support a finding of probable cause.[5]

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[4] In particular, law enforcement officers recognize that a short round-trip to an area known to be a source of narcotics, such as Florida, is often an indication of illicit narcotics activity. See, *e.g.*, *United States* v. *Mendenhall*, 446 U.S. 544, 562 (1980) (Powell, J., concurring); *United States* v. *Viegas*, 639 F.2d 42 (1st Cir.), cert. denied, 451 U.S. 970 (1981); *United States* v. *Price*, 599 F.2d 494, 501 & n.9 (2d Cir. 1979).

[5] The court's reliance to the contrary (Pet. App. 12a) on *Whiteley* v. *Warden*, *supra*, is completely misplaced. In *Whiteley*, the Court simply noted that the additional information in that case, which established no more than that either the informant or the sheriff knew the suspects and the kind of car they drove, did not provide probable cause. Indeed, the *Whiteley* Court specifically cited *Draper* as a case where probable cause existed because the additional information obtained by the police corroborated the informant's tip that the suspect was in the process of committing a crime, even though that corroboration was of innocent activity. See 401 U.S. at 567. Just as in *Draper*, the tip here described the means by which respondents would commit their crime and specified the date on which it would occur, and hence the police observations corroborated the tip that the crime was in progress at the time.

2. *Corroboration of an Informant's Tip May Establish Probable Cause Even if the Tip Standing Alone Fails to Satisfy the "Basis of Knowledge Prong" of the* Aguilar *Test*

The Illinois Appellate Court recognized that police corroboration of the information in an informant's tip, even "innocent details," can play a role in the probable cause determination. It held, however, that corroboration is relevant only where the tip fails to satisfy the "veracity prong" of the *Aguilar* test; if the tip alone does not satisfy the "basis of knowledge prong," the court held, no amount of corroboration by the police can remedy that defect and thus supply probable cause (Pet. App. 7b-8b). This distinction is based on a misunderstanding of *Aguilar*, and it has no basis in the Fourth Amendment.

a. At the outset, we note that the conclusion of both courts below (Pet. App. 10a-11a, 6b-7b) that the tip in this case standing alone does not satisfy the "basis of knowledge prong" is open to serious question. Both courts recognized the so-called "self-verifying detail" rule of *Spinelli*, *i.e.*, that this prong of the *Aguilar* test may be satisfied in the absence of a statement explaining the manner in which the informant obtained his information if the tip "describe[s] the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416. The courts below, however, found the detail here insufficient.

The detail supplied by the informant here was considerably greater than that involved in the accusation in *Spinelli*, which this Court held lacked sufficient de-

tail. The informant's letter gave a detailed description of the modus operandi of the smuggling operation, explaining that Susan Gates would drive the car to Florida, where it would be loaded with drugs, and then Lance Gates would fly to Florida to drive the car back to Illinois. The tip also gave the exact date of the respondents' next trip to Florida. It also described the street location of respondents' residence and stated the amount of drugs presently stored there and the amount ordinarily brought back on one of the Florida trips. Finally, the letter noted that respondents "brag about the fact they never have to work" and that major drug dealers often visit their home, suggesting that the informant had some personal contact with respondents. This wealth of detail is certainly sufficient to dispel the possibility that the informant's accusation was based merely on "a casual rumor" or respondents' "general reputation." Indeed, while the informant here did not give a description of respondents or their clothing, his description of the criminal enterprise was substantially more detailed than in *Draper*, which this Court has identified as a "suitable benchmark" for assessing the self-verifying detail of an informant's statement. *Spinelli* v. *United States*, *supra*, 393 U.S. at 416-417.

b. Assuming that the detail here falls short of satisfying the "basis of knowledge prong," however, the holding of the Illinois Appellate Court (Pet. App. 7b-8b) and the suggestion of the Illinois Supreme Court (*id.* at 11a-12a) to the effect that corroboration of the tip cannot possibly establish probable cause are erroneous. Nothing in the decisions of this Court, which consistently contemplate the possibility of establishing probable cause by means of police investigation of tips that do not meet the *Aguilar* test,

suggests that corroboration can cure a defect in the "veracity prong" but not the "basis of knowledge prong." Indeed, these decisions uniformly reject such a distinction.[6]

The leading decision on this point is *Draper*, where the informant had an established track record for reliability. See 358 U.S. at 309. Hence, the "veracity prong" clearly was satisfied, and the police corroboration on which the Court relied to establish probable cause was necessary only because the tip failed to satisfy the "basis of knowledge prong." Similarly, in both *Adams* v. *Williams*, *supra*, and *Ker* v. *California*, *supra*, the Court relied on police corroboration of a tip by a reliable informant (407 U.S. at 146-147; 374 U.S. at 35). Moreover, in *Spinelli*, though it ultimately considered the corroboration there insufficient, the Court's extensive discussion of the weight to be given to police corroboration indicates its view that probable cause could have been established in that case by adequate corroboration even though the tip plainly failed to reveal the informant's basis of knowledge (393 U.S. at 416).[7] Thus, it is clear that

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[6] Neither the decisions below nor the other authorities that reject corroboration as a means of satisfying the "basis of knowledge prong" dispute that corroboration can cure a defect in the "veracity prong." In the words of the Maryland decision on which the courts below relied, this is because "[p]resent good performance shows [the informant] to be probably 'credible' just as surely as does past good performance." *Stanley* v. *State*, 19 Md. App. 507, 529, 313 A.2d 847, 861 (1974). For the reasons stated earlier, we believe that the police corroboration here satisfied the "veracity prong" even though the anonymous informant obviously was not previously known to be credible.

[7] Indeed, even in *Aguilar* itself, where the tip obviously met neither prong of the test, the Court indicated that an entirely different case would have been presented if the results of police

this Court consistently has contemplated that corroboration can remedy a failure of a tip to meet the "basis of knowledge prong."

While the courts below relied on dictum in one case from an intermediate state court (*Stanley* v. *State*, 19 Md. App. 507, 313 A.2d 847 (1974)), the federal courts of appeals have almost uniformly drawn no distinction that would bar the use of corroboration to establish probable cause where a tip fails to meet the *Aguilar* "basis of knowledge prong." See, *e.g.*, *United States* v. *Haynie*, 637 F.2d 227, 232-233 (4th Cir. 1980); *United States* v. *Sanders*, 631 F.2d 1309, 1312-1313 (8th Cir. 1980); *United States* v. *Baker*, 577 F.2d 1147, 1150 (4th Cir.), cert. denied, 439 U.S. 850 (1978); *United States* v. *Edmond*, 548 F.2d 1256 (6th Cir.), cert. denied, 433 U.S. 912 (1977); *United States* v. *Tuley*, 546 F.2d 1264, 1268 (5th Cir.), cert. denied, 434 U.S. 837 (1977); *United States* v. *Myers*, 538 F.2d 424, 426 (D.C. Cir. 1976), cert. denied, 430 U.S. 908 (1977); *United States* v. *Horton*, 488 F.2d 374, 378-379 (5th Cir. 1973), cert. denied, 416 U.S. 993 (1974); *United States* v. *Canieso*, 470 F.2d 1224, 1229-1231 (2d Cir. 1972); but see *United States* v. *Bush*, 647 F.2d 357, 365 (3d Cir. 1981). The rule suggested by the courts below is perverse in that it permits the "basis of knowledge prong" to be satisfied by uncorroborated details supplied by the informant under the "self-verifying detail" rule (see *Spinelli* v. *United States*, *supra*, 393 U.S. at 416-417), but not by independent corroboration of details supplied by the informant. If the mere recitation of details by an informant supports the in-

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surveillance of the suspect had been presented to the magistrate. 378 U.S. at 109 n.1. See also *Spinelli* v. *United States*, *supra*, 393 U.S. at 438 (Fortas, J., dissenting).

ference that he obtained his information in a reliable manner, then surely the corroboration by independent investigation of details supplied by the informant, even if fewer details are involved, also can support an inference that the informant obtained his knowledge in a reliable manner.[8]

The error of the courts below stems from an unduly narrow focus on the specifics of the *Aguilar* test, although that decision is merely an application of broad Fourth Amendment principles. In determining whether to issue a search warrant, the question before the magistrate is always whether a reasonable person would conclude from the facts presented in the affidavit that probable cause exists. This decision is complicated somewhat when the affidavit relies on hearsay information provided by an informant. In those circumstances, this Court has said that the magistrate must determine whether there is a "substantial basis for crediting the hearsay." *Jones* v. *United States*, 362 U.S. 257, 269 (1960). See also *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).

Aguilar does not depart from this approach. See *United States* v. *Harris*, 403 U.S. 573, 581 (1971) (opinion of Burger, C.J.). Rather, *Aguilar* estab-

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[8] To be sure, the inference that the informant's accusation of criminal activity has a reliable basis is weak where the corroborated facts are innocuous details that any member of the general public could learn through a chance encounter with the suspect, such as a description of his car. See, *e.g.*, *Spinelli* v. *United States*, *supra*, 393 U.S. at 426-427 (White, J., concurring); *United States* v. *Montgomery*, 554 F.2d 754, 758 (5th Cir. 1977). Here, of course, the corroborated facts concerned the manner of carrying out the criminal scheme, and the fact that the informant's information was proven correct was strong evidence that he had access to reliable information not available to the general public.

lishes two critical factors—the basis of the informant's knowledge and his veracity—to be considered in the particular context where the affidavit is based solely on an informant's tip. Outside of that context, however, such as when independent investigation reveals additional information or corroborates the tip, the specific formulation of the two-pronged test need not be followed rigidly. Rather, the magistrate must examine all the facts to see whether probable cause exists, though this judgment is still informed by a comparison with the *Aguilar* test. See *Spinelli* v. *United States*, *supra*, 393 U.S. at 415. This is necessarily so because the nature of the corroboration frequently establishes the reliability of the tip far better than could a statement of the informant's "basis of knowledge." Probable cause may exist even if the "basis of knowledge prong" is not strictly satisfied.[9]

Strict insistence on the satisfaction of the "basis of knowledge prong" by a partially corroborated tip is particularly inappropriate where, as here, the tip is anonymous. When the accusation of criminal activity is made by a police officer (see *Nathanson* v. *United States*, 290 U.S. 41 (1933)), or even an informant known to the police, it makes good sense for

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[9] Indeed, even in the context in which it specifically applies —an uncorroborated tip—*Aguilar* does not necessarily require that the informant's basis of knowledge be revealed. It directs the magistrate to consider the basis of the informant's knowledge, and ordinarily probable cause will not be found where a reliable basis is not shown. However, if an affiant states that he has a tip from an informant who always has refused to reveal his basis of knowledge but whose tips invariably have proven to be accurate on numerous past occasions, it is questionable whether *Aguilar* would compel a finding of lack of probable cause.

the magistrate to insist on being told the basis for the accusation—a simple question asked of the accusing police officer or informant should reveal the source. Cf. *Aguilar* v. *Texas*, *supra*, 378 U.S. at 114 n.4. When the informant is anonymous, however, the police cannot question him about his basis of knowledge. If such an anonymous tip is uncorroborated, *Aguilar* makes clear that the tip does not establish probable cause. But there is no reason to deny police the opportunity to investigate the tip and establish probable cause through partial corroboration; yet a general rule barring corroboration of a tip that fails to satisfy the "basis of knowledge prong" would do just that. The result of such a rule would be to limit severely the utility to law enforcement personnel of anonymous tips, which are vitally important in detecting organized crime and narcotics violations. See *United States* v. *White*, 648 F.2d 29, 43-44 (D.C. Cir. 1981), cert. denied, No. 80-6704 (Oct. 13, 1981).

The proper test for assessing the corroboration of a tip is that set forth in *Spinelli*: Is the tip together with the corroboration as trustworthy as a tip that meets the *Aguilar* test standing alone? On the facts of this case, the answer clearly is yes. The tip predicted that respondents would undertake a narcotics smuggling trip in a particular manner on a particular date. Law enforcement agents observed respondent Lance Gates make the trip in the manner and at the time predicted by the informant, and, moreover, the unusual nature of the trip suggested no likely purpose for the trip other than the criminal purpose identified by the informant. Surely this degree of corroboration provides a stronger basis for believing the informant's accusation of criminal activity than would a statement in the anonymous letter that the

information was based on the informant's personal knowledge or some additional detail about Lance Gates' clothes and physical appearance—either of which would have enabled the tip to meet the "basis of knowledge prong" without any corroboration. In short, the police observations that corroborated the informant's tip about respondents' modus operandi and the date of their next trip to Florida gave the circuit judge who issued the warrant reason to find that "the suspicions engendered by the informant's report [had] ripen[ed] into a judgment that a crime was probably being committed." *Spinelli* v. *United States, supra*, 393 U.S. at 418.

B. The Illinois Supreme Court Failed Adequately To Consider The Fact That The Search Was Conducted Pursuant To A Warrant

Even assuming that the question whether the affidavit here failed to establish probable cause is closer than we have argued, and that a magistrate could properly have refused to issue a warrant on this showing, the Illinois courts erred in failing to accord any deference to the circuit judge's determination that a warrant should issue. It cannot seriously be disputed that the detailed tip and corroboration here created a degree of suspicion that, at the very least, was close to probable cause. This Court stated in *United States* v. *Ventresca, supra*, 380 U.S. at 109: "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." As a result, this Court consistently has recognized that the "determination of probable cause [by a magistrate issuing a warrant] should be paid great

deference by reviewing courts." *Spinelli* v. *United States*, *supra*, 393 U.S. at 419. See also *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Aguilar* v. *Texas*, *supra*, 378 U.S. at 111; *Jones* v. *United States*, *supra*, 362 U.S. at 270-271. The courts below paid no heed to this principle. The result is that, even though the police here faithfully submitted their information for consideration by a neutral judicial officer and acted in full compliance with the Constitution, indispensable evidence of a serious crime has been suppressed because a reviewing court disagreed with the issuing judicial officer on the nuances of what constitutes probable cause. That result is inconsistent with "a system of justice responsive both to the needs of individual liberty and to the rights of the community." *United States* v. *Ventresca*, *supra*, 380 U.S. at 112.

Indeed, it is questionable whether the purposes of the exclusionary rule are served at all by suppression of evidence seized by police action in good faith pursuant to a validly obtained warrant, even if the magistrate's determination of probable cause is later determined to have been erroneous.[10] This Court has established that "the application of the [exclusionary] rule [is] restricted to those areas where its remedial objectives are thought most efficaciously

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[10] We do not suggest that application of the exclusionary rule is never appropriate when a search has been conducted pursuant to a warrant. Suppression may be justified if the factors relied on by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (*Brown* v. *Illinois*, 422 U.S. 590, 610-611 (Powell, J., concurring)), or if the warrant was procured in bad faith or on the basis of material misrepresentations (see *Franks* v. *Delaware*, 438 U.S. 154 (1978)).

served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). In the Fourth Amendment context, the principal purpose of the exclusionary rule is to deter official misconduct. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 459 n.35 (1976); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975). Here, there was no misconduct by the police, who acted in good faith at all times, and therefore suppression can have no beneficial deterrent effect. See, *e.g.*, *United States* v. *Peltier*, *supra*, 422 U.S. at 542; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974); *United States* v. *Williams*, 622 F.2d 830, 840-846 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981).[11]

Suppression is particularly inappropriate here because of the meticulous care taken by the police to ensure that their conduct at all times comported with constitutional requirements. First, rather than taking precipitous action based on the tip, the police independently investigated the allegations in the tip and sought to corroborate them through surveillance of Lance Gates. When their surveillance confirmed the accuracy of much of the information provided in the tip, the police did not act on their own initiative, but instead sought a warrant from a neutral judicial

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[11] The error perceived by the courts below was made by the judicial officer who issued the warrant. Suppressing evidence on the ground that a warrant should not have been issued because probable cause was lacking is a costly and ineffective way of ensuring that such judicial officers exercise their duties properly. Indeed, it is dubious whether suppression would have any effect at all on the judicial officer's future conduct. While a law enforcement officer will ordinarily be aware of and concerned by a lost prosecution, a judicial officer who issues warrants has no similar personal stake in the outcome of a criminal trial and may even be uninformed of a suppression order.

officer.[12] Moreover, they provided the judicial officer with every bit of information they possessed that would assist him in making a reasoned, independent decision, including copies of the informant's letter and the report from the Illinois Secretary of State (see Pet. App. 4b, 10b). And they executed the warrant properly and in the good faith belief that it was valid. In these circumstances, it would serve no Fourth Amendment policy to suppress the seized evidence; indeed, suppression could have the deleterious effect of tending to discourage police officers from submitting their evidence to a judicial officer before acting. See *United States* v. *Ventresca*, *supra*, 380 U.S. at 108.

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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MARCH 1982

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[12] Because one object of their suspicion was an automobile, the police could have conducted the search of respondents' vehicle without a warrant. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Had they elected to do so, however, the courts would be justified in scrutinizing more closely the adequacy of the information on which they acted.

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Docket Sheet

NO. 81-430-CSY	TITLE	Illinois, Petitioner v. Lance Gates, et ux.

DOCKETED	COURT
Aug. 25, 1981	Supreme Court of Illinois

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Melbourne A. Noel, Jr.
	Counsel for Respondents: James W. Reilley, Paul P. Biebel, Jr. Clyde Woodrow Woody
Aug. 25, 1981	Petition for writ of certiorari filed. (Record filed).
Sept. 24, 1981	Order extending time to file a response to the petition until Oct. 30, 1981.
Oct. 29, 1981	Brief for the respondents in opposition filed.
Nov. 4, 1981	DISTRIBUTED. 11-25.
Dec. 1, 1981	REDISTRIBUTED. 12-4.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
Jan. 11, 1982	Petition GRANTED.

Feb. 8, 1982	Motion of petitioner for leave to amend or enlarge question presented for review filed.
Feb. 10, 1982	DISTRIBUTED. 2-26. (Above motion)
Feb. 12, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until March 25, 1982.
Feb. 24, 1982	Respondent's answer to Motion for leave to amend or enlarge question presented for review filed.
Mar. 1, 1982	The motion of petitioner for leave to amend or enlarge question presented for review is DENIED.
March 10, 1982	Brief, amicus curiae, of the State of California filed.
March 24, 1982	Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., joined by The Chicago Crime Commission et al. in support of petition filed.
March 25, 1982	Brief, amici curiae, of Laws at Work (L.A.W.) joined by the states of Alabama, Arizona, et al. filed.
Mar. 27, 1982	Brief for the petitioner filed.
Mar. 27, 1982	Joint appendix filed.
Mar. 31, 1982	Brief, amicus curiae, for the U. S. filed.
Apr. 7, 1982	Order extending time to file the respondents' brief on the merits until May 28, 1982.
May 28, 1982	Brief for the respondents filed.
July 13, 1982	CIRCULATED.
July 14, 1982	Reply brief for the petitioner filed. (D).
	(Over)

81-430

Title

No.

DATE	PROCEEDINGS AND ORDERS
July 20, 1982	Motion of respondents for divided argument filed.
Sept. 9, 1982	The motion of respondents for divided argument is DENIED.
Oct. 13, 1982	ARGUED.